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REPORTS  
OF  
CASES ARGUED AND ADJUDGED  
IN THE  
**Court of Appeals of Maryland.**

WILLIAM T. BRANTLY,  
STATE REPORTER.

VOLUME 80.

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## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### THE COURT OF APPEALS.

Hon. JOHN MITCHELL ROBINSON, Chief Judge.  
Hon. HENRY PAGE, Associate Judge.  
Hon. DAVID FOWLER, Associate Judge.  
Hon. ANDREW HUNTER BOYD, Associate Judge.  
Hon. CHARLES BOYLE ROBERTS, Associate Judge.  
Hon. JAMES MCSHERRY, Associate Judge.  
Hon. JOHN PARRAN BRISCOE, Associate Judge.  
Hon. WILLIAM SHEPARD BRYAN, Associate Judge.

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### THE CIRCUIT COURTS.

FIRST JUDICIAL CIRCUIT.—*Worcester, Somerset, Dorchester*  
and *Wicomico* Counties.

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Hon. HENRY LLOYD, Associate Judge.  
Hon. CHARLES F. HOLLAND, Associate Judge.

SECOND JUDICIAL CIRCUIT.—*Caroline, Talbot, Queen Anne's,*  
*Kent and Cecil* Counties.

Hon. JOHN MITCHELL ROBINSON, Chief Judge.  
Hon. JOSEPH A. WICKES, Associate Judge.  
Hon. FREDERICK STUMP, Associate Judge.

THIRD JUDICIAL CIRCUIT.—*Baltimore and Harford Counties.*

Hon. DAVID FOWLER, Chief Judge.

Hon. JAMES D. WATTERS, Associate Judge.

Hon. NICHOLAS CHARLES BURKE, Associate Judge.

FOURTH JUDICIAL CIRCUIT.—*Allegany, Garrett and Washington Counties.*

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Hon. EDWARD STAKE, Associate Judge.

FIFTH JUDICIAL CIRCUIT.—*Carroll, Howard and Anne Arundel Counties.*

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Hon. I. THOMAS JONES, Associate Judge.

Hon. JAMES REVELL, Associate Judge.

SIXTH JUDICIAL CIRCUIT.—*Montgomery and Frederick Counties.*

Hon. JAMES McSHERRY, Chief Judge.

Hon. JOHN A. LYNCH, Associate Judge.

Hon. JOHN T. VINSON, Associate Judge.

\*Hon. JAMES B. HENDERSON, Associate Judge.

SEVENTH JUDICIAL CIRCUIT.—*Prince George's, Charles, Calvert and St. Mary's Counties.*

Hon. JOHN PARRAN BRISCOE, Chief Judge.

Hon. JOHN B. BROOKE, Associate Judge.

Hon. J. PARRAN CRANE, Associate Judge.

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\*Appointed by the Governor on January 21st, 1895, *vice* the Hon. John T. Vinson, whose term of office had expired by constitutional limitation.

EIGHTH JUDICIAL CIRCUIT—*Baltimore City.*

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Hon. JOHN UPSHUR DENNIS, Associate Judge.

Hon. CHARLES EDWARD PHELPS, Associate Judge.

Hon. DANIEL GIRAUD WRIGHT, Associate Judge.

Hon. PERE L. WICKES, Associate Judge.

Hon. ALBERT RITCHIE, Associate Judge.

†Hon. JOHN J. DOBLER, Associate Judge.

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Attorney-General.

JOHN PRENTISS POE, Esq.

---

Clerk of the Court of Appeals.

J. FRANK FORD, Esq.

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†Elected by the people November 6th, 1894.



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## CASES

DECIDED DURING THE PERIOD COMPRISED IN THIS VOLUME, AND  
DESIGNATED BY THE COURT "NOT TO BE REPORTED."

**MORGAN, SARAH B. and D. C. MORGAN vs. FERDINAND C. DUGAN et al., Trustees.** *Petition by the appellees, trustees in insolvency of J. J. Duffy, stating that the appellant, Sarah B. Morgan, had received the assignment of two policies of insurance on the life of Duffy as security for a debt due to her by him; that she had disposed of all her claims against Duffy, and praying for a transfer of the policies to the trustees. The order of the Court of Common Pleas directing the proceeds of the policies to be paid to the trustees is affirmed, it appearing that the policies had been assigned to the appellant to secure the payment of a certain note only, and there being no satisfactory proof of any subsequent agreement between the parties that they should stand as security for other indebtedness. No. 34, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 725, of "Opinions Unreported."*

**FOREMAN, ARTHUR T. vs. THE PRESBYTERIAN ASSOCIATION OF BALTIMORE et al.** *Where land in a deed of conveyance is described by calls, &c., which include a certain road, and this is followed by the clause "containing one acre, &c., more or less, exclusive of twenty feet wide along the third line heretofore appropriated to the purpose of a road," this clause does not exclude the road, being no part of the description of the lot. It cannot divest the estate previously granted, and the purpose of*

*the grantor was not to modify the preceding description.*  
No. 65, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 734, of "Opinions Unreported."

POULTNEY, WALTER DE C. *vs.* CHARLES F. W. DEPKIN. *Bill by the appellant for an injunction to prevent the use of the wall of his building by the appellee as a party wall. Held that under the contract between the parties the appellee had a right to the use of the wall, and the decree of the Circuit Court of Baltimore City dismissing the bill is affirmed.* No. 66, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 720, of "Opinions Unreported."

BLACK, CALVIN H. *vs.* ANNIE M. HERRING *et al.*, Trustees. *Certain allowances and charges in the accounts of trustees under a will held to have been properly made, and the decree of Circuit Court No. 2, of Baltimore City, is affirmed.* No. 61, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 728, of "Opinions Unreported."

LOOMIS, LORENZO B. *vs.* SAMUEL DEETS. *Action for enticing away, detaining and harboring plaintiff's infant son. There being no evidence that the defendant aided the son in efforts to resist parental control, the judgment of the Circuit Court for Harford County is affirmed.* No. 54, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 730, of "Opinions Unreported."

MARYLAND ICE COMPANY *vs.* THE ARCTIC ICE MACHINE MANUFACTURING COMPANY. *After this case had been twice before the Court of Appeals, it was sought in the*

*present appeal to correct a statement of fact contained in the opinion of the Court below from which the first appeal was taken. The statement was acquiesced in at the time and the cause having been remanded to the end that a new decree might be passed in conformity with the opinion of the Court of Appeals, and such decree appearing to have been passed, this appeal was dismissed. No. 33, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 716, of "Opinions Unreported."*

TALBOTT, HENRY M. *vs.* COOKE D. LUCKETT. *Plaintiff sued to recover a sum alleged to be due under an agreement between himself and the defendant to co-operate in the sale of certain mill property to a corporation in which the plaintiff was a stockholder and to divide the commissions. It appearing from the whole record that the plaintiff was not entitled to recovery, the judgment of the Circuit Court for Montgomery County is affirmed. No. 20, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 713, of "Opinions Unreported."*

WHITE, EDWARD and PETER DUNCAN *et al.* *vs.* ANNA E. MORRIS and JOHN W. TWILLEY. *Bill for an injunction to restrain the execution of a judgment obtained by the appellant, Duncan, against the appellee, Anna E. Morris. Since the evidence clearly shows that if the proper credits were entered on the judgment it had been paid, the decree of the Circuit Court for Wicomico County making the injunction perpetual is affirmed. No. 2, October Term, 1894. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 722, of "Opinions Unreported."*



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# MARYLAND REPORTS.

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OCTOBER TERM, A. D. 1894.

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## JOHN K. WHITE AND GEORGE B. WHITE *vs.* PITTSBURGH NATIONAL BANK OF COMMERCE.

### *Assignment for Benefit of Creditors—Bond of Trustee—Attachment.*

Where, after an assignment for the benefit of creditors has been executed and recorded, but before a bond has been filed by the trustee, as required by Code, Art. 16, section 205, an attachment is laid upon the property of the debtors, the lien of such attachment is not affected by the subsequent filing of the bond.

### Appeal from the Circuit Court for Allegany County.

On August 17, 1893, the appellants, John K. and George B. White, non-residents of the State of Maryland, but owning real and personal property situate in Allegany County, Maryland, executed an assignment to trustees for the benefit of creditors, conveying all the real and personal property of the grantors, in trust to sell and dispose of the same, etc., and pay all the just demands of the creditors of the grantors in full, or equally in proportion in the event of an insufficiency of assets. This deed was recorded on the next day. On September 12, 1893, the appellee, the Pittsburgh National Bank of Commerce, sued out an attachment against J. K. and G. B. White as non-residents, under which real and personal property of the said defendants was attached. On October 18, 1893, the trustees under the assignment filed their approved bond with the Clerk of

the Circuit Court for Allegany County. On January 6th, 1894, the defendants moved to quash the attachment upon the ground that the property attached did not belong to them when the attachment was issued, but had previously been conveyed to the said trustees. At the hearing of the motion to quash, objection was made to the admission in evidence of the bond filed by the trustees ; which objection, by a divided Court (HOFFMAN and STAKE, JJ.), was sustained, and the defendants excepted. The motion to quash being overruled and judgment of condemnation entered, the defendants appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Wm. J. Read* and *De Warren H. Reynolds*, for the appellants.

A motion to quash an attachment may be made by the defendants upon the ground that the property attached did not belong to them. *Campbell v. Morris*, 3 H. & McH., 539; *Kirkpatrick v. O'Connell*, 62 Md. 310. Upon the execution of the deed of trust the title passed out of the grantors, but remained as an inchoate title in abeyance in the trustees, which became perfect upon the filing of a bond by them. The failure of the trustees to give bond or perform any other duty imposed by statute, does not affect the rights of the creditors under the assignment. *Winham v. Patty*, 62 Texas, 490; *Hardcastle v. Fisher*, 24 Mo. 70; *Bank of Commerce v. Payne*, 86 Ky. 446; *Scheibler v. Numduiger*, 85 Tenn. 674; 1 Am. and Eng. Ency. of Law, 874.

*Robert R. Henderson* and *Benj. A. Richmond*, for the appellee.

An examination of Section 205 of Article 16 of the Code will show that the filing of the bond was the principal, if not the sole condition precedent to the vesting of the title. It is true the deed is required to be recorded, and must

Md.]

Argument of Counsel.

necessarily be recorded, before or at the time of filing the bond, but the vesting of the title was made to depend expressly upon the filing and approval of the bond. If the filing of the bond was a "condition precedent" to the vesting of the title, and this Court has said so explicitly in *Stiefel v. Barton*, 73 Md. 410, then the title of the property remained in the appellants in abeyance, liable to be attached, and the lien of the attachment having been acquired long before the bond was filed, its subsequent filing could not divest the lien, and *Stiefel's case* is conclusive of the question.

Of course we admit that the title passed to the grantees on the 18th of October when the bond was filed, and passed then for all the purposes named in the deed, but affected nevertheless by the lien of our attachment which was laid on the 12th day of September.

The delivery of a deed is an absolute condition precedent to the vesting of title in a grantee. But suppose between the time of its execution or acknowledgment and its delivery, a lien was acquired on the property, could it be contended for a moment that the subsequent delivery could carry the vesting of the title back to the date of the deed? And yet, under the express language of our statute, delivery is not any more essential to the vesting of title under trust deeds than the filing of a bond. Both and all of these requisites are only successive steps in effecting the final transmutation of title, not one of which can be omitted, and all of which must have occurred before the title passes. A lien acquired in the meantime is just as effective as though acquired before the first step was taken. If the title can go back by relation for a month, it can do so for a year or for ten years. The same doctrine would make the filing of the bond validate a sale made long before the filing of the bond, notwithstanding the statute says that no such sale shall be valid or pass any title.

The statute is a highly beneficial and meritorious one, and should not be strained or construed away from its plain



and obvious intent and meaning to suit the convenience or procrastination of careless or unwilling trustees. It was manifestly passed for the protection of creditors, by requiring the trustee to indemnify them by a bond before he could control the property. If the trustee could acquire no title and make no valid sale before giving bond, the property destined for the creditor could not be wasted or lost by the trustee.

We also contend that the deed is void on two grounds, viz.: 1st. Because it purports to convey real and personal property to J. J. Hoblitzell and M. H. Hartzell, but nowhere in the deed sets out the christian name of the grantees, other than by said initials. This, we contend, is not sufficiently descriptive under Code, Art. 21, sec. 9.

2nd. The motion to quash does not deny any of the matters set up in the affidavit for attachment or short note, but by way of confession and avoidance, merely sets up title in the garnishee to the property attached. The affidavit charges that John K. and George B. White are partners, trading as J. K. and G. B. White, and not being denied by the next succeeding pleading, *i. e.* the motion to quash, the same is taken as admitted. Acts of 1888, chap. 248; *Zilhman v. Cumberland Glass Co.* 74 Md. 303, and cases cited therein. It is thus fully made out on the Record that John K. and George B. White were partners, trading as J. K. & G. B. White. This being so, it will be apparent to the Court that the deed of trust is void. It professes to convey all the property of John K. and G. B. White, real and personal, of every description and wheresoever situate, and yet makes no provision for the application of partnership property to partnership debts, or individual property to individual debts. On the contrary, it provides that after costs and expenses are paid the trustees shall devote the whole balance of all the property conveyed to them to "pay all the just demands of the creditors of the said John K. and George B. White in full," or, if not sufficient, then to pay the same equally without preference between the individuals.

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Opinion of the Court.

No distinction is made between partnership and individual creditors in the distribution of the assets, and this we submit renders the deed of trust void. *Gable v. Williams*, 59 Md. 53; *Collier v. Hanna*, 71 Md. 261.

PAGE, J., delivered the opinion of the Court.

On the 17th day of August, 1893, the appellants executed, for the benefit of creditors, a deed of trust, which was filed for record on the 18th day of August. On the 12th day of September following, the appellees sued out an attachment, and, on the same day had it laid on certain property of the appellants, particularly described in the return of the sheriff. On the eighth day of October next ensuing, the trustees named in the deed filed a bond for the faithful discharge of their duties, and, on the sixth day of January, 1894, the appellants moved the Court to quash the attachment, alleging that, by the execution, delivery and recording of the deed, and the filing of the bond, the property attached became and was, at the time of the issuance of the writ, the property of the trustees, and not liable to seizure and condemnation under the attachment. To the action of the Court in overruling this motion, this appeal was taken.

The sole question for this Court arises, therefore, out of the fact that, though the deed of trust was executed, delivered and recorded prior to the issuing and laying of the attachment, the bond of the trustees was not filed until afterwards. This involves the construction of Section 205 of Article 16 of the Code, by which it is provided that every trustee to whom any estate, real, personal or mixed, shall be limited or conveyed for the benefit of creditors, or to be sold for any other purpose, shall file with the Clerk of the Court in which the deed or instrument creating the trusts may be recorded, a bond, &c. \* \* "but when the sale is to be on a contingency, no bond need be given until the contingency happens; no title shall pass to any trustee as aforesaid until such bond shall be filed and approved as

aforesaid, and no sale made by any such trustee without such bond shall be valid or pass any title to such property." The proper construction of this Act has already been twice considered and passed upon by this Court, and it is unnecessary now to do more than refer to the cases. In *Barton v. Stieffel and Cohen*, 73 Md. 410, it was said: "Until the deed is so recorded, and the bond of the trustee so filed, no title to the property, the Code provides, shall vest in him. And, if the trustee, under such circumstances, acquired no title to the property, it remained subject to the claims of the vendor's creditors." In *Fidelity and Deposit Company v. Haines*, not yet reported, this construction of the statute was approved. After citing the case of *Barton v. Stieffel* (*supra*) approvingly, the Court said: "There can be no question, then, that, as the deed of trust in the case now under consideration was recorded, and the bond of the trustees approved and filed in Cecil County, the place of domicile of the grantor prior to the issuing of the writ of replevin \* \* \* the legal title passed to the trustees, &c."

The ruling of the Court below must therefore be affirmed.

*Judgment affirmed.*

(Decided November 14th, 1894.)

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Syllabus.

LEWIS N. HOPKINS, CITY COLLECTOR, vs. MARY  
B. VAN WYCK ET AL., EXECUTORS, &c.*Taxation—Escaped Property—Time of Assessment.*

If assessable property has been omitted from the assessment books, or has escaped assessment when it ought to have been assessed, the fact that it has not been discovered and valued and placed upon the assessment books until after the levy has been made, cannot release its owner from paying taxes on account thereof, and cannot defeat the right of the State or the municipality to collect those taxes.

Baltimore City Code, Art. 50, sec. 5, provides that "the valuation of the property as it shall appear upon the assessors' books on the first Monday in March, shall be final and conclusive, and constitute the basis upon which the taxes for the ensuing year shall be assessed and levied." Defendants' testatrix died in March, 1892, having owned on the last day of February, 1892, certain personal property not on the assessment books on the first Monday of March. This property was subsequently discovered and placed on the books in May, 1892, two days after the levy for that year had been made. *Held*, that such property was liable to taxation for the year 1892.

Appeal from a *pro forma* judgment of the Baltimore City Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER and BOYD, JJ.

*Thomas G. Hayes, City Counsellor, and Wm. S. Bryan, Jr., City Solicitor, for the appellant.*

The amount claimed by the appellant is \$647.34, with interest, and, although small, yet the principle involved in the decision of the question in this appeal is of the greatest importance to the public authorities of the State and of the city of Baltimore, as well as of interest and importance in determining whether the 15th Article of the Declaration of Rights can and may be enforced.

Mrs. Harriet E. Van Wyck died on the 9th of March,

1892. After her death and from the disclosures of her inventory filed in the Orphans' Court, and not until then, it was discovered that on the last of February, 1892, she owned the stocks and bonds in question. These stocks and bonds were not, in compliance with the existing law, reported by Mrs. Van Wyck prior to 1st Monday in March, 1892, (March 7th), as was her duty, and hence were not on the assessment books of the tax department of Baltimore, on said date.

The property in question having been owned in February, 1892, by the appellees' testator, should have been reported and included under the provisions of Article 50, Section 5, of City Code, in the basis of taxation as it appeared in the reports made by the Appeal Tax Court to the City and State Comptrollers, on the 1st Monday in March, 1892. But the sole reason why these stocks, etc., were not on said tax books was because Mrs. Van Wyck had failed to perform her duty and comply with the law, and report the property she owned, prior to the 1st Monday in March, 1892, to the Appeal Tax Court. The Appeal Tax Court discovered, from the inventory of Mrs. Van Wyck's personal property, on the 12th May, 1892, that solely by her act this property had escaped being included in the basis as reported on 1st Monday of March, 1892, and at once, May 12th, 1892, and for the first time this property was placed on the assessment books by the Appeal Tax Court and taxed for 1892, after notice had been given Mrs. Van Wyck's executors, the appellees. The appellees resist the payment of the taxes in question on the theory that, as the first Monday in March is the day as of which property for the current year is assessed in Baltimore City (City Code, 1892, Art. 50, sec. 5), no property which is not listed on the assessment books of the city on that day can be compelled to pay taxes for the current year.

It is conceded by the appellant that the first Monday in March in each year is the day fixed, *as to ownership*, which fixes the liability for taxes of the property for the current

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year. That is to say, it is conceded, if property of this class is owned *prior* to the first Monday in March, it is taxed for that year, but if owned *after* said date, it is not taxed for that year.

The contention of the appellant in the case at bar is that, inasmuch as Mrs. Van Wyck owned the property in question in February, 1892, it was taxable for 1892; that no owner of property who may succeed in eluding the vigilance of the tax officials until after the first Monday in March can escape taxes for the current year on property owned prior to that date; that when such property is discovered, if at any time before limitation has actually barred the claim, then such property can be valued and assessed for the back taxes, and the owner compelled to do tardy justice, which his or her own unlawful concealment has alone prevented being sooner done, by the payment of these taxes which he or she has unlawfully attempted to escape.

If this is not the law, it is a hollow form to speak of taxes as an apportionment of the public burdens, or to declare in the organic law that "every person in this State, or person holding property therein, ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property."

If the contention of the appellees is correct, what becomes of the doctrine of this organic law, when it declares taxes shall be uniform and equally apportioned. This the appellees, according to their theory, would brush aside, and in lieu thereof substitute the doctrine that the payment of taxes depend on one's ability to elude the discovery by a fixed day by the tax officers, of the hidden wealth of those whose disturbed consciences, for their wrongful conduct, are lulled into repose by the fact that it is only the city and State that is deprived (if not robbed) of its own, and that others will bear the burdens and pay the city and State that which they have thus unlawfully escaped.

1st. The Legislature has itself the power, or it may delegate the power to a municipal corporation, for municipal

purposes, to regulate the mode and manner of assessment and collection of back or escaped taxes. If by reason of defective machinery taxes have not been collected the Legislature may remedy the defect by retrospective legislation.

1 *Blackwell on Tax Titles*, sec. 324; *Burroughs on Taxation*, sec. 93; *Cooley on Taxation*, 356; *Maguire v. Board of Revenue, etc.*, 71 Alabama, 422; *Scribner v. Assessors*, 37 La. An. 913; *Stope v. La. Savings Bk.*, 32 La. An. 1137; *Noyes v. Hall*, 137 Mass. 266; *Harwood v. N. Brookfield*, 130 Mass. 561; *Overing v. Foote*, 43 N. Y. 294; *Shore v. Manitowoc*, 57 Wis. 5.

2nd. The laws of Maryland and ordinances of the Mayor and City Council of Baltimore make ample provisions for the assessing and collecting of back or escaped taxes, as was done in the case at bar. Under these laws and ordinances the intention is plain that escaped property should be put upon the books when and as discovered. Code, Art. 81, secs. 10, 13; Public Local Laws, Art. 4, secs. 827, 828; City Code (1892) Art. 50, sec. 13; Ordinances Nos. 80, 83-93, approved May 10, 1892. Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally to carry out the purposes of their enactment. *U. S. v. Hodson*, 10 Wall. 395.

3rd. The provision in Art. 50, sec. 5, of City Code (1892) in these words: "And the valuation of the property as it shall appear upon the assessors' books on the first Monday in March shall be final and conclusive, and constitute the basis upon which the taxes for the ensuing year shall be assessed and levied," in no wise impairs the correctness of the appellant's contention that the stocks and bonds in question are subject to the payment of taxes for 1892.

This section provides for a "valuation" which is made "final and conclusive." That is, the ascertained value of the property then listed by the tax official, as to the owner as well as to the city, is "final and conclusive." This can't be changed. This only applies to such property as has

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been on that date listed or reported. It can't be made to apply to property then liable to valuation and taxation that is owned *prior* to that date, and which its owner has concealed.

The purpose especially of making that basis is to give it to the State Comptroller as a basis for levy of State taxes, as well as furnish the Mayor and chief finance officer of city of an amount which will enable them or the City Council to fix the *rate*. The levy, as heretofore seen, is on *all* the assessable property in the city. This section can't mean that this basis is to be the *exclusive* basis, and nothing else shall be added. If so, what is the meaning of Section 21 of same Article and Code, which provides for the placing in the basis all new improvements finished on or before the first day of April?

Taxes may be levied upon property which has been listed by the assessor after the time prescribed by law. *Anderson v. City of Mayfield*, 19 S. W. Rep. 599 (Ky.); *Wills v. Bierbank*, 17 N. H. 406.

If the failure by the assessor to list and assess the property by the time prescribed by law, does not vitiate the tax, how much greater is the reason that that property should be taxed when the failure to list and assess by the time prescribed is attributable, not to the assessor, but to the unlawful concealment of the property by its owner to elude the payment of taxes? See *Am. Coal Co. v. Co. Com. Allegany Co.* 59 Md. 195.

*Skipwith Wilmer* and *James M. Ambler* (with whom was *Randolph Barton* on the brief), for the appellees.

As the whole question in this case depends upon the proper construction of the statute law of Maryland, little light is to be gained from a discussion of the laws that prevail in other States or from the decisions of Courts in other jurisdictions. Attention need only be called to the fundamental principle, laid down in every treatise upon the subject of taxation, that the assessment must always precede



the levy. If taxes are to be equal and uniform, before it can be determined what rate will yield a required amount of revenue, it is necessary, of course, to know the amount of property on which the tax may be levied. *Cooley on Taxation* (2nd ed.) 351 *et seq.*; 1 *Desty on Taxation*, sec. 93. *Welty on Assessment*, sec. 7.

The tax laws applying to the whole State are codified in Art. 81, secs. 1-42 of the Public General Laws; the Acts of the Legislature relating specially to the city of Baltimore, in Art. 4, secs. 827-856 of the Public Local Laws; and the municipal ordinances in the Baltimore City Code, Art. 50, secs. 1-73.

Assuming that the annual assessment or revision of the assessment books must be completed on a certain day, or as of a certain day, it is of course necessary that this day should be early enough to have the taxable basis ascertained, the lists made up and the tax levied in time for the collector to complete the work of his department within the year. Accordingly, all the provisions, both of the statutes and of the ordinances, point to an early day in March as the time when the tax lists are to be completed. The books as they then stand are finally and forever closed, and are the authoritative record of the amount of property on which each citizen is liable to taxation for the ensuing year. They furnish the only basis on which the City Council can estimate the city's revenue for the year. They constitute the basis of all the accounting between the State and city and the collector, and are the only means by which the comptrollers can keep a check on the collector's accounts.

The final and conclusive character of this record is illustrated by the number of cases in which trifling irregularities have enabled persons to escape the payment of taxes altogether. *Welty on Assessments*, section 7; *Cooley on Taxation*, 2d ed., pages 408 and 411. Inaccurate description of property and even the omission of the dollar mark have been held to have this effect. *Hamel v. Smith*, 15 Ohio, 134; *Richardson v. State*, 5 Blackf. 51; *Bingham v. Smith*, 64 Me.

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451; *Hayden v. Foster*, 13 Pick. 492; *Woods v. Freeman*, 1 Wall. 398; *Lawrence v. Fast*, 20 Ill. 340; *Tilton v. Oregon C. R. R. Co.*, 3 Sawyer, 22.

None of these cases could have arisen if the tax officers were authorized to make corrections on the assessment books. Nor can it work hardship on any individual to hold him bound by what the record discloses on the first Monday of March. If any man is then charged with property which he does not actually own, he has no right to complain. *County Commissioners v. Clagett*, 31 Md. 210. He knows, of course, what is the amount of his liability, as shown by the tax books, at any given time (*Bonaparte v. State*, 63 Md. 471); and if there is any error he can have it corrected by an appeal to the Appeal Tax Court before the books are closed. No additional charge can be made against him without full notice and opportunity to make objection.

The only provisions that could possibly be supposed to authorize any alterations in the assessment books as they stand on the first Monday in March, are to be found in sections 11, 12, 13 and 21, of Article 50, of the Baltimore City Code. Now assuming, what is by no means clear, that the assessment books referred to in section 11 may be books of prior years, it is to be observed that the alterations permitted are of a very limited and well-defined character. The expression of these, of course, excludes the possibility of any others. Nowhere is there the least suggestion of the power to *add* any property, except only in the case of persons applying for transfer or abatement; and even in that case the addition is manifestly to be subject only to future taxes. This is shown by the requirement that for a transfer all taxes, including those for the year in which the transfer is made, must first be paid. A more natural construction to give to this section, as well as to sections 12 and 13, which refer to the property of persons moving into the city and to property omitted in the regular course of valuation, is that these provisions are intended to negative the idea that the power to make such corrections, given in section

6 of the same article, ceases after the first Monday in December.

McSHERRY, J., delivered the opinion of the Court.

The question presented by this appeal arises on the following facts: Harriet E. Van Wyck, a resident of Baltimore City, died on March ninth, 1892, possessed of a considerable personal estate that had never been entered on the assessment books, but which was liable to be assessed for State and municipal taxation. On May the fourth her executors returned to the Orphans' Court an inventory of this property, and shortly thereafter the Register of Wills, in obedience to Sec. 9, of Art. 81, of the Code, furnished to the Appeal Tax Court a copy of the inventory. Thereupon the Appeal Tax Court notified the decedent's executors that this property would be placed on the assessment books for the year 1892, and on May the twelfth, just two days after the levy for 1892 had been made by the Mayor and City Council, the Appeal Tax Court entered this omitted property on the assessment books. The appellant, who is the collector of State and City taxes for 1892, made demand upon the appellees for the taxes due with respect to this property for the year 1892, but they declined to pay them upon the ground that their testatrix had not been charged with this property on the assessment books on the first Monday of March, 1892, but had been charged there-with two days after the actual levy of the tax for that year. A *pro forma* judgment was entered against the collector by the Baltimore City Court and from that judgment this appeal has been taken.

It is the declared policy of the organic law as embodied in the fifteenth article of the Declaration of Rights, that every person shall contribute to the support of the government according to his actual worth in real or personal property. As a means for ascertaining each individual's appropriate proportion, or his just contribution, general assessment laws have been passed at irregular periods; and, with the same

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view, by other enactments, large powers have been conferred upon the Appeal Tax Court of Baltimore City and the County Commissioners of the several counties authorizing them, in the intervals between general assessments, to make valuations of omitted, newly discovered and recently acquired property; to provide for transfers where property has changed ownership; and to allow abatements and to fix revaluations in specified instances. In the system thus devised to put into effective operation the fundamental law, it is obvious that, to avoid confusion and uncertainty, some definite period had to be adopted as the point of time, in each year, when the valuation or appraisal fixed upon the property actually assessed and charged upon the books to each individual, would no longer be open to question, but would be conclusively ascertained and made binding upon both the city and the taxpayer alike. Accordingly the Mayor and City Council, by Sec. 5 of Art. 50 of the City Code of 1892, provided that "the valuation of the property as it shall appear upon the assessor's books on the first Monday in March, shall be final and conclusive and constitute the basis upon which the taxes for the ensuing year shall be assessed and levied." But it was never designed by this provision to exempt from taxation for a current year the individual who, by adroitness or otherwise, succeeded in eluding the vigilance of the assessors, or who, by inadvertence, was not rated with all his assessable property on the first Monday in March of that particular year. Nor was this provision intended to put a limit or restriction on the power of the municipality to make an assessment of omitted or escaped property after the date indicated. If such had been its purpose it would have been repugnant to the policy and spirit of the organic law itself; because it would then have created an exemption of all property not actually assessed by a designated day, though the property so exempted was by law liable to assessment. Its only object is to fix for a current year a final and conclusive valuation upon such property of each taxpayer as is, on the first

Monday in March, actually entered upon the assessment books ; and not to exempt property that is not, but ought rightfully to be there. It has relation to ascertained values and not to an exclusive basis. This is rendered entirely free from doubt by reference to Sec. 21 of Art. 50 of the City Code. By that section all new improvements finished to the extent named in the section, on or before the first of April, are directed to be assessed and included in the basis for the then current year—a procedure utterly inconsistent with the assumption that the books as made up on the first Monday in March are final and conclusive, not merely as to values, but as to what property can lawfully be assessed at all for that year.

It is not, however, upon the property actually listed or assessed that taxes of this sort are levied. They are levied against the individual, and not upon his property at all. The extent of his liability is measured by the amount of his *assessable*, and not by the amount of his *assessed* property ; and if his assessable property is not actually assessed he is not thereby relieved or exempted. So far, then, as concerns his obligation to contribute his just share of such taxes, it is wholly immaterial whether his property has been assessed or not, for the obligation is dependent not upon the circumstance or accident of assessing, but upon the fact of his ownership. When, therefore, for the convenient and methodical ascertainment of values a definite day has been prescribed by statute or by ordinance as the time when the valuation of things actually valued shall be final, the power to value and to add to the assessment books other and different things is necessarily not abridged or interfered with. This seems to us to be essentially so as a plain result from the language and intent of the organic law. But without resting solely on this deduction there are acts of Assembly and ordinances of the city which directly warrant the claim that the State and the municipality assert through the collector.

Sec. 10 of Art. 81 of the Code of Public General Laws

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requires the County Commissioners and Appeal Tax Court, in all cases where discoveries of assessable property are made in the modes there pointed out, "or in any other way," to assess and add the same to "the amount on which taxes shall be levied;" and Sec. 13 authorizes them to deal in like manner with property that may have been omitted. Sec. 13 of Art. 50 of the City Code is an ordinance passed under the broad powers conferred by Sec. 827 of Art. 4 of the Code of Public Local Laws, and provides that the Appeal Tax Court shall inform itself in reference to all property "which may have escaped, or which may have been omitted in the regular course of valuation," and directs that it shall be valued. Now, the property in question, though owned by the appellees' testatrix on the first Monday in March, 1892, was not upon the assessment books on that day. It had at that time obviously escaped or had been omitted in the regular course of valuation. But escaped or been omitted from what? Not from the books for 1893, because that year had not arrived; but from the books for the year during which it had been owned by the testatrix, and during which it ought to have been assessed—that is, for the year 1892. If its omission from the books on the first Monday in March, 1892, precluded the Appeal Tax Court from including it when discovered afterwards in the list of assessable property with which the testatrix was properly chargeable for that year, then, as we have already observed, the policy of the law that requires every one to contribute according to his actual worth in real and personal property would be defeated for a particular year by a concealment of assessable property until after the first Monday in March, no matter how long theretofore the individual might have owned the property. To such a contention we cannot assent. If the property was omitted from the valuation for 1892, as it undoubtedly was, because, though owned by the testatrix prior to the first Monday in March, it was not included in the list of that year, then, when discovered it should have been placed on the lists from which it had

been omitted. If valued and placed upon the list, whether before or after the actual levy of the tax is immaterial, it should form part of the property by which the amount of its owner's taxes for that year ought to be measured and ascertained. The levy of 1892 was made not, upon the assessed property within the city, but was a prescribed rate as to every hundred dollars worth of each individual's assessable property. And this, as we have said, included as well that which he owned but was not assessed with, if it was not exempted by law, as that with which he was actually assessed.

If assessable property has been omitted from the assessment books or has escaped assessment when it ought to have been assessed, the fact that it has not been discovered and valued and placed upon the assessment books until after the levy has been made, cannot release its owner from paying taxes on account thereof, and cannot defeat the right of the State or the municipality to demand and collect those taxes. In the case of the *American Coal Co. v. Co. Com. Al. Co.*, 59 Md. 185, it appeared that the coal company was assessed upon its real estate, and that taxes were levied against it by the County Commissioners prior to the first day of July, 1880, and within the time fixed by Sec. 6, of Art. 25, of the Code, for the levying of taxes; that the State Tax Commissioner valued the shares of stock of the company, from which valuation the company took an appeal to the Comptroller and Treasurer of the State, and that this appeal was not disposed of until July 22nd; that upon the next day the Tax Commissioner forwarded to the County Commissioners a certificate of the assessment of these shares of stock, and that within a few days thereafter the County Commissioners made a levy of taxes on this assessed value of the stock. It was objected, that as the levy on those shares had not been made prior to the first day of July, 1880, but was in fact made more than three weeks thereafter, it was illegal and void; but this Court upheld the levy. In dealing with the provision which directs the levy to be made

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prior to the first day of July, the opinion reads: "This is codified from the Act of 1853, ch. 239; but it will be observed that it does not say that the levy of the taxes shall in all respects be completed before the day named. The construction of the statute should be reasonable and liberal, in order to support the action of the commissioners, rather than strict and severe, by which the action of the commissioners would be defeated." Then, going to the question of delay in making the levy, the opinion proceeds: "Under such circumstances," the ones we have already stated, "showing no fault or neglect on the part of the County Commissioners, we discover no sufficient ground for saying that the tax in question was illegally assessed or levied. It would neither be just, nor sustained by rules of fair construction, to hold that the county should lose the benefit of the assessment of the stock because of the delay in deciding the appeal or from delays in no manner attributable to the fault of the County Commissioners. We therefore hold that this objection to the levy cannot be supported."

If any effect is to be given to the statutes and ordinances providing for the assessment of escaped or omitted property, we are at a loss to see how it can be done other than by the mode pursued in this instance.

We think there was error in granting the defendants' prayer and in rejecting the plaintiff's, and as a consequence the *pro forma* judgment must be reversed and the case must be remanded, to the end that a judgment may be entered for the appellant for the amount claimed.

*Judgment reversed with costs above and below and case remanded that judgment may be entered for the appellant.*

(Decided November 14th, 1894.)



JOHN HENRY KEENE, JR., AND OTHERS, *vs.*  
GEORGE F. CORSE, AND DAVID H. CARROLL,  
EXECUTORS, &c.

*Probate of Wills—Caveat.*

When a caveat to a will is filed before the same has been admitted to probate, the Orphans' Court has no power to admit the will to probate until the caveat has been disposed of.

Appeal from the Orphans' Court of Baltimore County.

On June 30th, 1894, two of the appellants, next of kin of John H. Keene, Sr., deceased, filed in the Orphans' Court of Baltimore County a notice of objections to the probate of the will of said Keene, and asked that when the same should be exhibited for probate they might receive notice and have an opportunity to file a caveat in regular form. On July 3, 1894, the will was filed and affidavits of some of the witnesses thereto taken, and on the same day an order was passed fixing July 11th, 1894, for a hearing of the objections to the probate. On the day named the appellants filed a formal caveat to the will, and citation to the appellees, executors therein named, was issued July 24th, returnable August 1, 1894. On August 1, 1894, the appellants moved the Court to require an answer to the caveat, and on the same day the Orphans' Court passed an order admitting the will to probate, and granted letters testamentary to the appellees. From this order the caveators appealed.

The cause was argued before ROBINSON, C. J., MCSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*John I. Yellott* (with whom was *O. I. Yellott* on the brief), for the appellant.

It is only when no objection has been made or caveat filed by some of the near relations, that probate can be

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Argument of Counsel.

taken. Code, Art. 93, secs. 327, 331; *Emmert v. Stouffer*, 64 Md. 552. The right to have the paper propounded as a will admitted to probate, was opposed by the next of kin, in the form which gave them the right to a trial by jury and in a court of law. The admission of the will to probate denied to the contestants this constitutional and legal right. It was a judgment *in rem* conclusively establishing the validity of the alleged will. Code, Art. 93, secs. 249, 250; *Emmert v. Stouffer*, 64 Md. 553; *Mills v. Humes*, 22 Md. 358; *Pegg v. Warford*, 4 Md. 385; *Warford v. Colvin*, 14 Md. 553.

Where the validity of a will is contested, letters *pendente lite* must be granted, and the practice of the Orphans' Courts in such event may be found in a number of cases. *Hanna v. Munn*, 3 Md. 230; *Pegg v. Warford*, 4 Md. 393; *Lee v. Price*, 12 Md. 253; *Sumwalt v. Sumwalt*, 62 Md. 338.

*D. G. McIntosh* (with whom was *John W. H. Fry* on the brief), for the appellees.

They cited: *Ex parte Shipley*, 4 Md. 493; *Jones v. Jones*, 41 Md. 360; *Cox v. Chalk*, 57 Md. 570; *Compton v. Barnes*, 4 Gill, 55; *Townsend v. Brooke*, 9 Gill, 91; *Schley v. McEnery*, 36 Md. 266; *Michael v. Baker*, 12 Md. 158; *Buchanan v. Turner*, 26 Md. 1. They also moved to dismiss the appeal because the order of Court in this case was passed in a summary proceeding and no evidence was incorporated in the record, citing in support of the motion, Code, Art. 5, sec. 59; *Cecil v. Harrington*, 18 Md. 510; *Cecil v. Cecil*, 19 Md. 73; *Gephart v. Strong*, 20 Md. 522; *Cannon Admr. v. Cook*, 32 Md. 482; *Bowling v. Estep*, 56 Md. 564, *Biddison v. Moseley*, 57 Md. 89; *Cox v. Chalk*, 57 Md. 569.

McSHERRY, J., delivered the opinion of the Court.

After the death of John H. Keene, Sr., and before his executors propounded his will for probate, two of his sons filed in the Orphans' Court of Baltimore County a written objection to the probate of the will. Later on the will was

filed, but no notice appears to have been given that upon a specified day it would be probated. On the contrary, on the same day that it was filed, the proof of two of the attesting witnesses seems to have been taken. Some days later and before any order had been passed by the Orphans' Court admitting the will to probate, a formal *caveat* was interposed and the executors were duly summoned to answer it. Subsequently, and without disposing of the *caveat* at all, though a motion had been made for the executors to answer, so that issues might be framed, the Orphans' Court signed an order admitting the will to probate and granting letters testamentary to the executors named therein. From that order this appeal was taken by the caveators.

The question thus presented is free from any difficulty. By Secs. 230 and 323 of Art. 93 of the Code, the Orphans' Courts are given jurisdiction to admit wills to probate. Under Secs. 322, 328 and 329, the method of doing this is prescribed. Notice is required to be first given to such of the next relations of the deceased as may conveniently be served therewith, as to the time of exhibiting the will for probate; and if, after such notice has been given, no objection shall be made or no *caveat* shall be filed, the Court is authorized to proceed and take the proof of the execution and publication of the will. The authority to thus proceed and admit the will to probate obviously and in terms depends upon the giving of the notice and the absence of an objection or a *caveat*. Orphans' Courts are tribunals of limited jurisdiction. Their proceedings, when assailed on appeal, must show a compliance with the provisions of the statutes conferring jurisdiction upon them; and those proceedings must be in conformity with and not repugnant to the statutes. Now, in the case before us, the plain letter of the statute, as well as its manifest purpose and intention, permits the Orphans' Courts to admit a will to probate only after notice has been given, and if there be no objection and no *caveat* filed. The filing of a *caveat* at any stage before an order has been signed admitting the will to probate arrests all

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further proceedings until the *caveat* has been disposed of. If this were not so, the very questions put in issue by the *caveat* would be prejudged by the Orphans' Court *ex parte*. These tribunals have no discretion when issues are demanded. "The duty of the Orphans' Court to make up and transmit issues to a Court of Law when required is imperative." *Price v. Taylor*, 21 Md., 363. The Orphans' Court of Baltimore County erred when in the face of the pending *caveat* it admitted the will to probate, and its order will be reversed and the cause will be remanded, that issues may be made up and transmitted to the Circuit Court for trial.

*Order reversed and cause remanded.*

(Decided November 14th, 1894.)

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## THE BALTIMORE AND OHIO RAILROAD COMPANY *vs.* THEOPHILUS BARGER.

*Carriers—Assault by Conductor—Evidence—Damages.*

In an action by a passenger to recover damages for an assault on him by the conductor of defendant's train, evidence that on some other occasion, the time and circumstances of which are not mentioned, the plaintiff had used abusive and profane language to the conductor and made threats against him, is not admissible.

There may be cases in which the conduct of a passenger towards an employee, is such that the carrier would not be liable for an assault committed by the employee. But the mere fact that a passenger uses abusive and profane language to a conductor, does not justify an assault by him, and the carrier is liable for his act.

If the assault was provoked by the language used by the plaintiff, the jury are authorized to consider such provocation in mitigation of damages. But when the fact that he used such language is denied by the plaintiff, the jury cannot be instructed that from all the evidence in the case, the plaintiff is not entitled to recover exemplary damages.

Under the circumstances of this case, an instruction that the jury are "at liberty to consider the violent character of the defendant's conduct and the outrage to the feelings of the plaintiff, and thereupon award such exemplary or punitive damages as the circumstances may in their judgment require," was correct.

Appeal from the Circuit Court for Washington County.

The appellee, while a passenger on defendant's train, was assaulted by the conductor, and brought an action against the appellant to recover damages. The evidence on the part of the defendant tended to show that the assault was provoked by threatening and profane language on the part of the plaintiff, while this was denied by the latter. The first exception was taken to the refusal of the Court, (STAKE, J.) to allow the conductor to be asked whether, on some other occasion, the plaintiff had not uttered threats against him. The second exception was taken to the granting of the plaintiff's prayers and the rejection of seven prayers of the defendant. The instructions granted by the Court were as follows:

*Plaintiff's First Prayer.*—The plaintiff, by his counsel, prays the Court to instruct the jury, under the pleadings and evidence in the cause, that if they believe from the evidence that on the 29th day of January, 1892, the plaintiff was a passenger on the cars of the defendant from Brunswick to Weverton, in this State; that he had a ticket entitling him to be carried on said cars from Brunswick to Weverton, and that while he was such passenger on said cars, he was assaulted and struck by the conductor of said cars, that then their verdict must be for the plaintiff.

*Plaintiff's Second Prayer.*—That in estimating the damages sustained by the plaintiff, the jury are not confined to the mere corporal injury sustained by him, but that they are also at liberty to consider the violent character of the defendant's conduct, and the outrage to the feelings of the plaintiff, and thereupon to award such exemplary or punitive damages as the circumstances may, in their judgment, require.

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*Defendant's Seventh Prayer.*—If the jury believe from the evidence that the plaintiff used foul and profane language to the conductor of the defendant in order to provoke an assault by said conductor, with the purpose of bringing this action for damages, the jury are to consider such conduct in mitigation of damages, if they should find for the plaintiff.

The prayers offered by the defendant and refused by the Court were as follows :

*Defendant's First Prayer.*—If the jury find from the evidence that at the time of the injury complained of, the conductor had taken up the plaintiff's ticket, and that the plaintiff then used foul and abusive language to the conductor, and that such conduct on the part of the plaintiff, if the jury find such, caused or provoked the assault complained of, and that in making said assault, if the jury so find, the conductor was not acting for the defendant and within the scope of his duties as conductor, but was carrying out a personal purpose and feeling, then the defendant is not liable for such act of the conductor, and the plaintiff cannot recover.

*Defendant's 2nd Prayer.*—If the jury believe from the evidence that the plaintiff handed his ticket to the conductor on the day of the injury complained of, and then, in the presence and hearing of other passengers, used grossly profane and abusive language to the conductor, without any provocation on the part of the conductor, then he was guilty of such a breach of decorum as forfeited his right to be carried as a passenger and for the assault made by the conductor, if they so find, the plaintiff is not entitled to recover more than nominal damages.

*Defendant's 3rd Prayer.*—If the jury believe from the evidence that the plaintiff handed his ticket to the conductor on the day of the injury complained of, and then, in the presence and hearing of other passengers, used grossly profane and abusive language to the conductor, without any provocation on the part of the conductor, then he was guilty of such a breach of decorum as forfeited his right to be car-

ried as a passenger, and for the assault made by the conductor, if the jury find such assault, the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendant.

*Defendant's 4th Prayer.*—If the jury find from the evidence that the injury complained of was caused or provoked by the plaintiff himself, he is not entitled to recover.

*Defendant's 5th Prayer.*—If the jury find from the evidence that the injury complained of was caused or provoked by the plaintiff himself, he is not entitled to recover compensatory or exemplary, but nominal damages only.

*Defendant's 6th Prayer.*—That from all the evidence in the cause the plaintiff is not entitled to recover exemplary damages, but such damages only as will compensate him for the injury done him, in estimating which the jury are at liberty to consider the offensive language of the plaintiff (if they shall find that he used such language), in mitigation of the damages.

*Defendant's 8th Prayer.*—If the jury believe from the evidence that the plaintiff used foul and profane language to the conductor of the defendant's train, in order to provoke an assault by said conductor, with the purpose of bringing this action for damages, the plaintiff cannot recover.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*J. Clarence Lane* (with whom were *John K. Cowen* and *Henry H. Keedy, Jr.*, on the brief), for the appellant.

A railroad company is not liable to a passenger for the wilful act of its employee, unless the same was done in the course of the servant's employment, and while the relation of carrier and passenger still subsisted. *Central Ry. Co. v. Peacock*, 69 Md. 257; *Gilliam v. S. & N. Ala. R. R. Co.*, 70 Ala. 268; 15 A. and E. R. Cas., 138, and notes. The plaintiff, by his own improper conduct, had forfeited his rights as a passenger, and could have been ejected from the

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train. He was therefore a mere stranger, and entitled, only to the consideration of such. *N. O. R. R. Co. v. Jopes*, 142 U. S. 18. It is not more the duty of railroad companies to transport their passengers safely, than it is the duty of passengers to behave in a quiet and orderly manner. *P. Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512. Whether or not the act in question is outside of the scope of the servant's duty, is for the jury; unless clearly independent and outside of such scope, when it will be so pronounced by the Court. *Dwinelle v. N. Y. C. R. R. Co.*, 120 N. Y. 117; 15 A. & E. R. Cas., 141, note; *B. & O. R. R. Co. v. Blocher*, 27 Md. 277; *Little Miami, &c., Co. v. Wetmore*, 19 Ohio St. 110; *Bayley v. M. & L. Ry. Co.*, L. R., 7 C. P. 415; *Mulligan v. N. Y., &c. Co.*, 129 N. Y. 50; *Patterson on Railway Ac. Law*, §§. 120, 121; 2 *Wood on Railroads*, pp. 1380 and 1381, and notes. Where a passenger by his own misbehavior, while being transported, provokes a personal encounter between himself and one of the carrier's employees, the carrier is not liable. *Scott v. Central Park R. R. Co.*, 53 Hun. 414; *Harrison v. Fink*, 42 Fed. R., 787; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110.

The second, fifth and sixth prayers of the defendant should have been granted. There was no justice in the plaintiff's claim for punitive damages. For, even if words of provocation alone are not held to justify an assault upon a passenger by the conductor, they may be considered in mitigation of damages. *Haman v. Omaha R. R. Co.*, 52 N. W. Rep. 830; *P., W. & B. R. R. Co. v. Hæflich*, 62 Md. 300; *P., W. & B. R. R. Co. v. Rice*, 64 Md. 63. The duties of carrier and passenger are reciprocal. It has been held that a railroad company is liable to a passenger for insults and abusive language used by an employee to him. *La Fitte v. N. O. R. R. Co.*, 43 La. An. 34; *Palmeri v. Man. El. R. R. Co.*, 39 N. Y. 23; *Conger v. St. Paul R. R. Co.*, 45 Minn. 207. The whole case should have been submitted to the jury, whether the plaintiff had broken the contract of carriage and had forfeited his rights as a passenger, and was



the real producer of the injury. If the jury had so found, it would have relieved the defendant from the strict rule of liability for acts of servants towards passengers. It would at least have disentitled the plaintiff to punitive or vindictive damages. *N. O. & R. Co. v. Jopes*, 142 U. S. 18; *N. J. Steamboat Co. v. Brockett*, 121 U. S. 667.

*Fred. J. Nelson*, for the appellee.

The two prayers of the plaintiff were properly granted. *Blocher's case*, 27 Md. 287; 2 *Beach Law of Railroads*, 1002. The propositions of law contained in the appellant's seven rejected prayers are unsound, and besides, the fourth, fifth and sixth are too general. *Cook v. Duvall*, 9 Gill, 461.

Boyd, J., delivered the opinion of the Court.

This was an action brought by Theophilus Barger, the appellee, against the Railroad Company for an alleged assault upon him by the conductor in charge of the train on which the appellee was a passenger. The evidence was conflicting as to the conduct of Barger. He testified that he was riding on the step of the rear car, as the train was crowded; that when the conductor came out on the platform he handed him his ticket and remarked to the conductor: "You did not get all your tickets to-night;" that the conductor accused him of applying an opprobrious epithet to him, which he denied, and the conductor struck him with his fist and then with his lantern. The conductor testified, that he collected Barger's ticket, who then said to him: "You thieving s—— of a b——, you had better get them all or I'll report you." He acknowledged that he then struck Barger with his fist, and claimed that the latter grabbed him by the collar, and he (the conductor) then struck him with his lantern, just as the train was leaving Knoxville. It is admitted that the difficulty occurred between the points embraced in appellee's ticket, which was good from Brunswick to Weverton. The conductor further testified, that when they reached Weverton, he said: "If you want any more

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out of me I will get down with you ;" and Barger replied : "I have got you just where I want you, and will sue the company."

The witness was then asked by the defendant's attorney "if before this, on some other occasion and on a different day, Barger had used abusive and profane language to him on the train, and made threats against the witness." That was objected to and the Court refused to let the question be asked or answered. This ruling of the Court is brought here for review by the first bill of exceptions. Without deciding how far, if at all, that character of testimony would be admissible in a case of this kind, if properly presented, it is manifest that the evidence disclosed in the record is too remote and indefinite. It was not stated how long before, on what occasion or what day it occurred, although it is affirmatively shown that it was on a day different from that of the assault. The ruling of the Court was therefore clearly right. If any authority be necessary, the case of *Gaither v. Blower*, 11 Md. 536, is in point.

At the conclusion of the testimony, the plaintiff offered two and the defendant eight prayers. Both of the former were granted and all of the defendant's were rejected, with the exception of the seventh. The rulings of the Court in these prayers are presented by the second bill of exceptions. The first, third, fourth and eighth prayers of the defendant deny the right of the plaintiff to recover at all, if the jury believed the facts stated in them.

The first is in substance that if the jury believed the plaintiff used foul and abusive language to the conductor which caused or provoked the assault complained of, and that in making said assault the conductor was not acting for the defendant and within the scope of his duties as conductor, but was carrying out a personal purpose and feeling, the defendant was not liable for such act of the conductor. The theory of that prayer is that the plaintiff had by his conduct forfeited his right as a passenger, and the act of the conductor was merely a personal matter between him

and the plaintiff, provoked by the latter, independent of and freed from the relation that had existed between the plaintiff and defendant as passenger and carrier.

To such a doctrine we cannot subscribe, under the circumstances of this case. There may be, and doubtless are, cases in which the conduct of a passenger towards the employee of a railroad company was such that the company would not be liable for the act of the employee. A conductor, for example, would be justified in the defence of his own person, or the property of the company in his charge, in using such force as would be necessary for their protection against a passenger or anyone else, without rendering the company liable. Because he occupies the position of a conductor, and his assailant, that of a passenger, does not deprive the former of the right of defending himself, or the property in his charge, so far as it becomes necessary. But that is not this case. The plaintiff was, at the time of the assault, a passenger on the train which was in charge of this conductor, who was the agent of the company to see, as far as he reasonably could, that the plaintiff and other passengers were properly treated and carried to their respective points of destination. If the plaintiff persisted in misbehaving on the train either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such case would be to eject the unruly passenger—not to assault him and then let his employer escape all liability, because he, the conductor, was carrying out a “personal purpose and feeling,” as stated in the prayer. A conductor of a train, doubtless, has his patience and forbearance severely tested at times, but he must not settle his own personal difficulties with the passengers, whilst they are such, any more than he should permit others to do so, when he could avoid it. If he has the opportunity to pre-

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vent an assault on a passenger in his charge, it is his duty to do so, and his failure to make a reasonable effort to protect the passenger from such assault, would make the company responsible. If that be a correct statement of the law, as it undoubtedly is, as settled by the case of the *New Jersey Steamboat Company vs. Brackett*, 121 U. S. 645, and numerous other authorities, then *a fortiori*, the company must be liable if the conductor makes an assault on one who is still a passenger as Barger was.

In the case of *Central Railway Company vs. Peacock*, 69 Md. 257, cited by the appellant, the plaintiff had left the car and had ceased to be a passenger, and hence, when the assault was made, the conductor "stepped aside from the line and scope of his employment," and therefore the company was not liable. The Court indicated very clearly, however, that if the assault had been made whilst the plaintiff was a passenger, and the driver (who was also acting as conductor) was still executing "the contract of transportation," the company would have been responsible. To hold otherwise would put a passenger at the mercy of the temper of a conductor.

Much of what we have already said applies to the third, fourth and eighth prayers. The third is to the effect that if the plaintiff used grossly profane and abusive language to the conductor in the presence of other passengers, without any provocation on the part of the conductor, he forfeited his right to be carried as a passenger, and the defendant was not liable for the assault. That was properly rejected for reasons already stated. The fourth is still more objectionable, as it is altogether indefinite and too general to guide the jury as to what would be deemed a sufficient cause of provocation to relieve the defendant, even if the theory contended for by it be correct. The eighth is likewise defective, and there is no legally sufficient evidence to show that the plaintiff used the language complained of to provoke an assault by the conductor for the purpose of suing the company. No such inference could properly be drawn from the

expression used by Barger, as testified to by the conductor, that "I have got you just where I want you, and will sue the company."

Whilst the language used by the plaintiff, according to the defendant's evidence, did not justify an assault by the conductor, it was certainly calculated to irritate him and arouse his passions, and hence, it becomes material as to whether the remaining prayers of the defendant and the second of the plaintiff properly presented the law applicable to the measure of damages to be allowed. The second and fifth prayers of the defendant undertook to confine the recovery to nominal damages. The second is like the third, and the fifth is the same as the fourth, excepting the third and fifth deny the right of the plaintiff to recover at all, whilst the other two limited his recovery to nominal damages. No authority has been cited, and we know of none, that would have justified the Court in granting those prayers under the facts in this case. The sixth prayer asked the Court to instruct the jury, "that from all the evidence in the cause the plaintiff is not entitled to recover exemplary damages, but such damages only as will compensate him for the injury done him, in estimating which the jury are at liberty to consider the offensive language of the plaintiff (if they should find that he used such language), in mitigation of the damages." We agree fully with the learned counsel for the appellant in his contention that if the jury believed the assault was provoked by the language used by the plaintiff, as testified to by the conductor and others, they were authorized to take the provocation into consideration in mitigation of damages. Whilst the law will not justify an assault on account of words used towards the assailant, it does recognize, as was said by LE GRAND, C. J., in 11 Md. 552, "the weakness and infirmities of human nature which subject it to uncontrollable influences when under great and maddening excitement superinduced by insults and threats." But this prayer does not properly present the question. It disregarded the evidence of the plaintiff him-

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self, who denied that he had used the language complained of. The Court could not therefore instruct the jury that "*from all the evidence in the cause* the plaintiff is not entitled to recover exemplary damages," etc., for if the jury believed the plaintiff, the assault was wholly unjustifiable, and such an one as would very properly call for exemplary or punitive damages. It may be true that the great preponderance of the testimony in the record contradicts the plaintiff, but it was for the jury and not for the Court to determine which was true. That prayer was therefore properly rejected.

It only remains to pass upon the plaintiff's prayers. We have already said that the conduct of the plaintiff, as disclosed by the record, did not justify the assault made by the conductor. We think the plaintiff's first prayer is in accord with that conclusion. In some cases the word "assaulted," as used in this prayer, might be objectionable on the ground that the Court left it to the jury to find whether or not, while the plaintiff was a passenger on the cars, he was *assaulted* and struck by the conductor. It is for the Court and not for the jury to determine whether certain facts amount in law to an assault. *Handy v. Johnson*, 5 Md. 450. But in this case the defendant was not injured thereby, as at most the Court, at the instance of the plaintiff, left to the jury to decide, as a matter of fact, what the Court on application would doubtless have decided, as a question of law. The word "assault" was moreover evidently not intended in its technical sense, as its context shows; and in the connection in which it was used was not calculated to mislead the jury or injure the defendant.

The only question remaining to be passed upon is the ruling on the second prayer of the plaintiff. That it announces a correct principle of law in the abstract may be admitted, but whether or not it was misleading under the circumstances of this case is not altogether free from doubt. It certainly might have been drawn in a way that would have been more clearly unobjectionable.

It is not every case of assault that authorizes a jury to  
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award exemplary damages. Whilst the provocation of the plaintiff may not *justify* an assault, yet if it be of such character as would naturally arouse the anger and passions of men of ordinary temperament, and it is not too remote, it is admissible in mitigation of damages. The authorities differ somewhat as to whether evidence of recent provocation can be admitted in mitigation of compensatory damages. In Wisconsin it has been held that it cannot be. *Corcoran v. Harrau*, 55 Wis. 122. Whilst in New York (*Kiff v. Youmans*, 86 N. Y. 330), and in Pennsylvania (*Robinson v. Rupert*, 23 Penn. 523), it has been decided that it may mitigate compensatory as well as punitive damages. It is said in *Robinson v. Rupert* (23 Penn. 323, *supra*), that "where there is a reasonable excuse for the defendant arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages and the circumstances of mitigation must be applied to the actual damages. If it were not so the plaintiff would get full compensation for damages occasioned by himself." But the authorities agree that sufficient provocation (of which the jury is ordinarily left to judge) will at least mitigate exemplary damages in actions for assaults, and the conduct of a passenger may be such as to preclude his right to exemplary damages for an assault by a conductor or other employee of a railroad company. We are not prepared, however, to say that under the circumstances of this case, the conduct of Barger, as disclosed by the evidence of the defendant in the record, was such as would have justified the Court below in instructing the jury, as a question of law, that they could not award punitive damages for the assault made on him. The conductor's own testimony shows that he not only struck Barger with his fist when the epithet was applied to him, but he followed it up with a blow over his head with the lantern. It would require very great provocation to justify a conductor in charge of a train using such violence on one in his care. It might have resulted in a riot or other serious trouble on that heavily loaded train to

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the great discomfort and danger of the other passengers. If the plaintiff's statement was believed by the jury the defendant was unquestionably liable for punitive damages, and this prayer submitted his theory of the case. By it the jury was *at liberty to consider* the violent character of the conductor's conduct and the outrage to the feelings of the plaintiff, and *thereupon*, to award such exemplary or punitive damages *as the circumstances in their judgment required*.

The defendant had the right to present its theory of the case in mitigation of damages—which is a matter of defence—but its prayers on the subject, as we have already determined, did not properly present the question. It would have been right for the Court to have granted an instruction of its own, but it was not required to do so, unless requested by prayers free from the defects pointed out in those that were offered. As the jury were simply told that they were *at liberty* to consider the character of the assault, and award such punitive or exemplary damages, as the circumstances in their judgment would require, they could have taken into consideration the conduct of the plaintiff, as well as of the conductor, in making up their verdict and the amount of the verdict rendered shows they were not inclined to punish the defendant very severely, if they allowed any punitive damages at all. The second prayer of the plaintiff in *Byers v. Horner*, 47 Md. 23, used language very similar to that in this prayer, and this Court said it ought to have been granted. Taking all the circumstances into consideration, we are of the opinion that there was no error in granting this prayer, and the judgment must be affirmed.

*Judgment affirmed with costs.*

(Decided November 14th, 1894.)



THE WASHINGTON, COLESVILLE AND ASHTON  
TURNPIKE COMPANY *vs.* PHILIP J. CASE.

*Liability of Turnpike Companies—Defective Bridges—Negligence—  
Pure Accident—Evidence.*

In an action against a turnpike company to recover damages for an injury alleged to have been caused by the defective timbers of a bridge on defendant's road, evidence of a witness, who examined the bridge several months after the accident, to the effect that the timber was decayed, and that, from his knowledge of the qualities of such wood, the decay must have set in at the time of the accident, is admissible.

A turnpike company is bound to keep its bridges in safe condition, and is liable to a person who, while exercising ordinary care himself, is injured in consequence of the unsafe condition of a bridge.

But such corporation is not an insurer of the safety of travellers using its roads and bridges. If a bridge is properly maintained, and an injury is caused by the accidental displacement of a single plank, of which the company had no notice and could not by the exercise of reasonable diligence have known, then the company is not liable.

For a mere accident, unmixed with the negligence or fault of the party to whom it is attributed, no action will lie. An accident which furnishes no cause of action, is an inevitable occurrence, not to be foreseen and prevented by vigilance and care, and not occasioned or contributed to, in any manner, by the act or omission of the company or its agents.

The fact that the bridge in question was repaired a year after the injury complained of, furnishes no evidence from which the plaintiff can claim that the repairs were made because the bridge was in a defective condition at the time and place of the accident.

The care and caution which a discreet and prudent individual would exercise if the risk were his own is not the care and caution required of a turnpike road or bridge company. The mere use of ordinary care in repairing the bridge would not exculpate the defendant if it had not by such care made the bridge safe.

The fact that the plaintiff had not paid toll for the use of the bridge where the accident occurs, does not exempt the defendant from liability for its negligence.

Appeal from the Circuit Court for Montgomery County.

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Statement of the Case.

This was an action to recover damages for an injury alleged to have been caused by the defective condition of a bridge on defendant's road. The plaintiff's evidence is set forth in the opinion of the Court. The defendant's witnesses testified that a constant supervision was exercised over the bridge, and that it was examined immediately after the accident and found to be in a sound condition. The first exception was taken to the action of the trial Court (VINSON and LYNCH, JJ.), in permitting a witness produced on the part of the plaintiff to testify that he had examined the bridge in question nearly a year after the injury complained of; that the sleeper upon which the boards of the flooring met was decayed, and that, from his knowledge of, and experience with timber, such decay must, in his opinion, have set in at the time of the accident. The second exception was taken by the defendant to the granting of the plaintiff's first and second prayers, and to the refusal of the Court to grant defendant's third, fourth, fifth, sixth, seventh and eighth prayers. The first and second prayers of the plaintiff, which were granted, were as follows:

*Plaintiff's First Prayer.*—The plaintiff, by his attorneys, prays the Court to instruct the jury, that if they find from the evidence that the defendant corporation owned and kept open for public travel the turnpike road spoken of in the evidence, then it was required to keep its said road and its bridges thereon in a safe condition for the use of persons who might use the same with ordinary care and caution; and if they further find that on the day of the happening of the injury complained of, the defendants had permitted a part of its road, the bridge referred to in the evidence, to be in an unsafe condition, and that in consequence of such unsafe condition the plaintiff, while travelling over said bridge and using ordinary care and caution, was injured as complained of, then the plaintiff is entitled to recover in this action.

*Plaintiff's Second Prayer.*—That the care and caution required of one travelling on a turnpike road, as stated in

the plaintiff's first prayer, is simply such as persons of common prudence ordinarily exercise under similar circumstances.

The prayers of the defendant, which were rejected, were as follows :

*Defendant's Third Prayer.*—The defendant prays the Court to instruct the jury, that no evidence as to the condition of any other portion of the bridge referred to in the testimony can be considered by them in making up their verdict, except such as the jury shall find, had some direct bearing in causing the plank to fly up ; if the jury so find, and even if the jury should believe that other portions of said bridge were defective, yet their verdict must be for the defendant, unless they shall find that there was such defect in said bridge as to cause the accident complained of.

*Defendant's Fourth Prayer.*—The defendant prays the Court to instruct the jury, that if they believe from the evidence that the defendant, some twelve months or more after the accident, made a general repair of said bridge, in connection with all other bridges on its road, that this furnishes no proof from which the plaintiff can claim it was done because it was out of repair at the place and the time of the accident, and unless the jury find from other evidence that said bridge at the time and at the place of the accident was actually in an unsafe condition, and that by reason thereof the alleged injury was actually sustained, without any carelessness on part of the plaintiff, then their verdict must be for the defendant.

*Defendant's Fifth Prayer.*—The defendant prays the Court to instruct the jury, that the degree of care and caution necessary to have been exercised by the defendant, in regard to the maintenance and repair (when needed) of the bridge referred to in the testimony, is that which a discreet and cautious individual would or ought to use if the risk were his own ; and if the jury believe from the evidence that the defendant exercised such care, then their verdict must be for the defendant.

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*Defendant's Sixth Prayer.*—The defendant prays the Court to instruct the jury, that in considering whether the defendant kept a well-maintained highway at the point of the alleged accident, they must consider the location of the road or bridge, the geographical features of the road, the difficulty of keeping it in a better condition without an unreasonable expense, the course of the stream, size and character of the same, and the kind and amount of travel having occasion to pass over it.

*Defendant's Seventh Prayer.*—If the jury believe from the evidence that the bridge in question was properly maintained to safely accommodate the travel and traffic on said turnpike road, and if the injury complained of was caused by the accidental displacement of a single plank on said bridge, of which the company had no notice, and could not by the exercise of reasonable diligence have known, then their verdict must be for the defendant.

*Defendant's Eighth Prayer.*—Unless the jury shall find from the evidence that the plaintiff, or his employer, for whom he was acting at the time of the alleged accident, had paid toll or contracted to pay toll for the use of the defendant's road and bridges, their verdict must be for the defendant.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*Thomas Anderson and W. Veirs Bouic*, for the appellant.

We shall claim, first and principally, that according to the appellee's contention, the injury was caused by an accident for which the appellant cannot be held responsible, and that the seventh prayer of the appellant, which was rejected by the Court below, should have been granted. "An accident is an event happening unexpectedly and without fault." *Cooley on Torts*, p. 93. "For a purely accidental occurrence causing damage without the fault of the person to whom it is attributable, no action will lie, for though

there is damage, the thing amiss, the *injuria* is wanting." *Cooley on Torts*, pp. 91, 92, 754; *Townsend v. President, etc., Turnpike Road*, 6 Johns (N. Y.) 90. The measure of liability of a turnpike company and a municipal corporation is precisely the same. *Chicago City v. Robbins*, 2 Black, 418; *Angell on Highways*, Secs. 8, 272, and cases.

Municipal corporations are not responsible for accidents happening by reason of defects in their streets or roads without fault of which they have no notice, and could not by the exercise of reasonable diligence have had notice. *Stoddard v. Town of Winchester*, (Mass.) 27 N. E. 1014; *Angell on Highways*, p. 388 (note.); *Idem*, p. 391, sec. 299; *Balls v. Woodward*, (Cir. Ct.) 52 F. 646; *Fuller v. City of Jackson*, 52 Mich. 197; *Davis v. City of Cory*, 154 Pa. St. 598; *Bergeoin v. City of Chippewa*, 82 Wis. 505; *Rockefort v. Town of Attleborough*, (Mass.) 27 N. E., 1013, and 82 Mich. 480, and 59 Hun. 617, (13 N. Y. S. 174.)

It was certainly error to reject the defendant's fourth prayer. Subsequent repairs, especially at so remote a period from the date of the alleged injury, are never permitted to go to the jury as evidence that the road was out of repair at the time of the alleged injury. *Patterson's Railway Accident Law*, p. 421, sec. 365.

The defendant's fifth prayer, we contend, correctly defined its obligation in regard to the maintenance of the bridge and the degree of diligence required of it. *Angell on Highways*, p. 321 (note.)

The defendants's eighth prayer should have been granted. *St. Louis Bridge Co. v. Miller*, 28 N. E. R. 1091; 39 Ill. Ap. 366; *Angell on Highways*, p. 9, sec. 9, and authorities cited.

*James B. Henderson* (with whom was *Edward C. Peter* on the brief), for the appellee.

A corporation authorized to receive toll for the use of its road is held to a higher degree of diligence in caring for the safety of its travellers, than a corporation performing that

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service for the public gratuitously would be. *St. Louis Bridge Co. v. Miller*, 138 Ill. 474.

The policy of the law differs essentially in the two cases. *Yale v. Hampden and Berkshire Turnpike Co.*, 18 Pick. 359. A turnpike company which derives a revenue from the use of its road is directly liable to those who travel upon it for injuries occasioned by want of repair of the road without any statutory provisions imposing such liability. *Balto. and Yorktown Turnpike Co. v. Parks*, 74 Md. 287. *Same v. Crouthers*, 63 Md. 564. It was the appellant's duty to keep its road in repair, and to know there was no defect in it, and it is liable for any injury to a person arising from want of repair whether the defect be latent or patent, unless he be in default or unless the defect arose from inevitable accident, tempest or lightning, or the wrongful act of some third person of which it had no notice or knowledge. It matters not that ordinary care was used. *Balto. and Yorktown Turnpike Road v. Parks*, *supra*; *Yale v. Hampden and Berkshire Turnpike Co.*, *supra*; *Penna. and Ohio Canal Co. v. Graham*, 63 Pa. St. Rep. 297; *Grisby v. Chappell*, 5 Richardson (S. C.) 455; *Railroad Co. v. Hughes*, 11 Pa. 141. And it was not necessary that the appellee should have paid toll. His liability to pay toll was a consideration for the undertaking on the part of the appellant to furnish him a safe road as an equivalent. *Park's case*, *supra*. *Yale v. Hampden and Berkshire Turnpike Co.*, *supra*. The appellee's first prayer was adopted from *Park's case*, *supra*, and is sustained by all the authorities cited in this brief. It is substantially the instruction given by the Court in *Townsend v. The Susquehanna Turnpike Road*, 6 Johns. Rep. 90, which was approved by the Court of Appeals in that case.

The appellant by its fourth prayer sought to withdraw from the consideration of the jury the evidence in chief of its own witness, that subsequent to the injury complained of he had reconstructed the bridge. This evidence was introduced without objection from the appellee, and the Court below properly refused to take it from the jury. 1

*Thompson on Trials*, sec. 722, citing *Decker v. Bryant*, 7 Barb. (N. Y.) 183; *Clinton v. Rowland*, 24 Barb. 534.

The appellant by its seventh prayer presents the theory that to render it liable to the appellee the injury complained of must have resulted from a patent defect in its road of the existence of which it had or by due diligence could have had notice, and to sustain this position a number of cases against municipal corporations are cited in its brief, disregarding the distinction drawn by the authorities between the liability of public and private corporations. *St. Louis Bridge Co. v. Miller*, *supra*; *Yale v. Turnpike Co.*, *supra*. The accidents for which turnpike companies cannot be held liable are such as arise from causes over which it has no control, such as tempest, lightning or wrongful act of a third person of which it had no notice or knowledge, not such as are caused by a condition which it has permitted to exist. In this case it is not so much the accidental displacement of a plank for which the appellant is held responsible, as the condition of the bridge which rendered such displacement probable or possible, whether such condition be the result of an originally defective construction or of gradual deterioration. This condition of the bridge it was bound to know. *Rapho v. Moore*, 68 Pa. St. Rep. 408.

McSHERRY, J., delivered the opinion of the Court.

This is a suit to recover damages for a personal injury. The verdict and judgment were in favor of the plaintiff and the defendant has appealed.

The appellant is a body corporate owning a turnpike road extending from Ashton to Sligo, in Montgomery County. The declaration alleges that a small bridge, forming part of the road, was negligently suffered to be out of repair, whereby the plaintiff in rightfully travelling along the road and across the bridge was hurt whilst using due care himself. It appears that the accident occurred in April, 1892, in the following manner: As the plaintiff was descending a hill above the bridge, driving a team which was hauling a heavily

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loaded four-horse wagon, he locked the wheels, and when he reached the foot of the hill immediately at the bridge, he went behind the wagon and unlocked the wheels. Whilst doing this the horses had passed on to the bridge. He then discovered that his lead horse was going too much to one side of the bridge and he ran forward to seize the lead line and control the direction of the team and as he got about midway of the bridge and opposite the wagon his left leg slipped through a hole in the bridge floor, which hole was caused by the displacement at that moment of a single plank composing a part of the flooring. This displacement was apparently produced by the front wheels of the wagon. Whilst in the act of withdrawing his leg the hind wheels passed over and pressed upon the same plank and injured his leg above the knee. The bridge was built upon two stone walls or abutments which were parallel to the stream. Upon these walls and at right angles to them a number of sills or sleepers were placed about twenty inches apart, and the oak flooring of the bridge was laid transversely upon and nailed to these sills. The boards forming the floor were not long enough to extend the whole width of the bridge, but were joined upon one of the sills slightly to one side of the centre. It was claimed by the plaintiff, that the plank which was displaced as above stated was displaced by one of the front wheels of the wagon forcing it off the sill on which the boards of the flooring met.

Upon the trial in the Court below, a witness testified that he was a builder and carpenter and was acquainted with the enduring qualities of timber, and that he had examined the bridge in February or March, 1893, nearly a year after the accident. The witness was then asked to describe the condition in which he found the sill or sleeper upon which the boards of the flooring met; but the defendant objected, whereupon the plaintiff's counsel stated to the Court, that they expected to prove by the witness that when he examined the sill in question it was badly decayed, and that from the extent of the decay then existing and his knowl-



edge of and experience with timbers, in his opinion the decay must have set in at the time of the accident. Thereupon the Court allowed the question to be asked and it was answered as indicated in the proffer above stated. This ruling forms the ground of complaint set forth in the first bill of exceptions. We see no serious objection to this ruling, and but little reliance was placed upon this exception in the oral argument. The opinion of the witness in connection with the facts to which he had testified was some evidence, though slight, that tended to show the condition of the sill when the accident happened, and whilst its value may not have been great, it was certainly admissible.

The only other exception contained in the record brings up the rulings on the prayers. The plaintiff's first and second prayers were granted and his third was conceded. The defendant's first was conceded, its second was granted, and its third, fourth, fifth, sixth, seventh and eighth were rejected. The first and second prayers of the plaintiff were properly granted. They fairly presented his theory of the case, and similar ones have been so frequently considered by this Court, that it would serve no useful purpose to review or discuss them. In the recent case of *Balto. & York. Turnpike Co. v. Parks*, 74 Md. 287, precisely the same instructions were upheld.

The defendant's seventh prayer, which was rejected, raises the chief question on this appeal. By that prayer the appellant asked the Court to say to the jury that if they believed from the evidence that the bridge was properly maintained to safely accommodate the travel and traffic on the turnpike road, and if the injury complained of was caused by the accidental displacement of a single plank on the bridge, of which the company had no notice and could not by the exercise of reasonable diligence have known, then the verdict should be for the defendant. This prayer ought to have been granted. Whilst independently of any statute, a turnpike road company or other similar corpora-

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tion, which charges tolls for the privilege of using its road or bridge, is liable for injuries occasioned by its negligence. *Balto. & York. Turnpike Co. v. Crowthers*, 63 Md. 564, and in this respect differs from a municipal corporation, which is only liable for a breach of some statutory duty, still neither upon principle nor authority can the former be treated as an absolute insurer of the safety of persons who use its roads or bridges. Even a carrier of passengers is not held to such a stringent liability, for he is only bound to employ "the utmost care and diligence which human foresight can use." *State, use of Coughlan, v. B. & O. R. R. Co.*, 24 Md. 102. If corporations of the kind now before us, be not insurers, it is difficult to suggest a reason for the refusal to grant the prayer now being considered. There was sufficient evidence, if credited by the jury, to support the hypothesis it submitted, and it comes then to the single inquiry whether the proposition of law it embodied was correct.

In all actions of this character negligence on the part of the defendant is the foundation of the plaintiff's case. If there be no negligence, though there be an injury, no action will lie. Negligence is purely relative. In every instance it essentially involves some breach or omission of a duty that is owed to another. Without this it cannot be predicated of any act. Where, however, the act complained of and alleged to be negligent could not by the exercise of proper diligence have been foreseen, and is concurrent in its origin with the resulting injury, and as simultaneous therewith as physical cause and effect can be, and there is no antecedent dereliction or breach of duty, actual or constructive, constituting an ulterior or primary cause, the act belongs not to the class of negligent acts, but to that described as accidents. For a mere accident, unmixed with negligence or fault on the part of the person to whom it is attributed, no action will lie. *Gault v. Humes*, 20 Md., 297. An accident, then, which furnishes no cause of action, is an inevitable occurrence, not to be foreseen and prevented by vigilance, care and attention, and not occasioned or contributed to, in any man-

ner, by the act or omission of the company, its agents, employes or servants. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126. It is distinguishable from an act of God in this, that in the latter there is, whilst in the former there is not the presence and operation of a *vis major*. *Patterson's Railway Accident Law*, 35, and cases cited in note 2.

There was evidence in the cause from which the jury might well have found that immediately before the accident the bridge was properly maintained; that is, was kept in repair to safely accommodate the travel and traffic over the road; that all the boards of the flooring were securely nailed down upon the sills or sleepers, and that no defects were visible or apparent. If besides finding these facts the jury had further found (and there was evidence, if credited, to justify the conclusion) that there was no defect or disrepair of any kind prior to the injury, but that the injury resulted from the "accidental displacement of a single plank" of which the company's agents and servants did not know, and could not by the exercise of reasonable diligence have known, because the displacement occurred simultaneously with the injury and from no antecedent neglect, then a case of accident, pure and simple, was presented without an ingredient of negligence. If this be so the company was not liable, and it was entitled to have that theory of the case presented to the jury as the seventh prayer was designed to present it; and there was consequently error in refusing to grant that prayer.

There is nothing in either *Crowther's case*, 63 Md. *supra*, or *Park's case*, 74 Md. *supra*, inconsistent with this conclusion. In each of those cases it was held that for defects in a turnpike road the corporation was responsible in damages to the person injured, even though no statute imposed the liability, and in neither was the doctrine laid down or suggested that this liability included an injury occasioned by a pure accident. On the contrary, in the last cited case, to preclude such an inference, it was expressly said, "If the defence had shown that the defect had been occasioned by

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causes over which it had no control, and of which (defect) it could not possibly, after its occurrence, have been aware, a different question would be presented."

There was also error in rejecting the fourth prayer of the appellants. It appears by the record that about a year after the accident happened the company directed all its bridges to be repaired. In doing this it was found that some of the timber in the bridge now in question was doted, or partially decayed, but still sufficiently sound and secure to have lasted several years. This doted timber was not put back in the bridge. By the fourth prayer the defendant asked the Court to say to the jury, that the fact that the bridge was repaired a year after the accident, furnished no evidence from which the plaintiff could claim that the repair was done because the bridge was in a defective condition at the time and place of the accident. In other words it asserted that because the bridge was repaired in June, 1893, it did not follow that it was out of repair in April, 1892. This seems to be obvious. There was no such relation between the act of repairing in 1893, and the condition of the bridge a little over a year before, as to justify the inference that the condition in 1892 necessitated the repair in 1893. When the fact to be proved is the condition at the time of the injury, evidence of a condition at a subsequent period so remote as to be an independent and collateral circumstance is clearly irrelevant. *Reed v. N. Y. C. R. W. Co.*, 45 N. Y. 574. The prayer sought to point out to the jury this legal principle, and should therefore have been granted.

The third prayer was properly rejected. There was no evidence to support its hypothesis.

The fifth, sixth and eighth prayers were also properly rejected. The fifth because the degree of care it prescribed as the measure of the defendant's obligation with respect to the maintenance of its bridges in repair was not rigorous enough; and because, further, it exempted the defendant from liability if it used the degree of care therein defined,

even though the bridge continued to be in fact defective. The care and caution which a discreet and prudent individual would exercise if the risk were his own is not the care and caution required of a turnpike road or a bridge company which charges tolls for the use of its road or bridge. Such a corporation is held to a degree of care closer akin to that exacted of a carrier of passengers. The mere use of ordinary care in repairing the bridge would not exculpate the defendant if it had not by such care made the bridge safe. *Horton v. Inhabitants of Ipswich*, 12 Cush. 488. The sixth prayer put an abstract proposition to the jury and for that reason was properly rejected. The eighth prayer was wrong. Whether the plaintiff had paid the toll or not was immaterial. He was liable to pay it, and his failure to pay it, if he did so fail, did not excuse the negligence of the defendant, if the latter was really guilty of negligence.

Because of the errors we have indicated the judgment must be reversed and the cause must be remanded that a new trial may be had.

*Judgment reversed with costs above and  
below and new trial awarded.*

(Decided November 14th, 1894.)

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Syllabus.

JAMES W. SMITH AND MICHAEL F. SECRIST *vs.*  
CHAS. W. GOLDSBOROUGH AND GEO. W.  
HOFFMAN, ELI ALBAUGH, MARY E. AL-  
BAUGH, OLIVER D. LEASE AND MINERVA  
LEASE *vs.* CHAS. W. GOLDSBOROUGH AND  
GEO. W. HOFFMAN.

*Opening Roads—Jurisdiction of County Commissioners—Petition—  
Signature—Appeal.*

Under Code, Art. 5, secs. 81, 82, upon an appeal from the determination of the County Commissioners concerning the opening of a new road, to the Circuit Court, the action of the Circuit Court is final and no appeal or writ of error lies to the Court of Appeals, where the orders passed, notices given, etc., meet the requirements of the law so far as jurisdictional questions are concerned.

The form of the verdict and the judgment of the Circuit Court in such case cannot be reviewed by the Court of Appeals.

Where parties file with the County Commissioners a petition for opening a new road, sworn to by one of them, and in subsequent proceedings adopt the same as their own, they cannot avoid any liability under Code, Art. 25, secs. 83, *et seq.*, by reason of the fact that they did not sign the petition at the end.

The omission to sign their names at the end of the petition was a mere irregularity, and did not render the petition or the subsequent proceedings void, or prevent the County Commissioners from taking jurisdiction of the case.

An order of the Board of County Commissioners determining that the public convenience of the community requires that the new public road, as laid down upon a survey, shall be opened, is a sufficient compliance with the provisions of the Act of 1892, ch. 426, sec. 95A, requiring the Commissioners to select such route as will *best* promote the public convenience.

The Commissioners may state their determination as to the public convenience, in the order appointing the Examiners.

The objection that the Examiners in executing the commission ignored the rights of a party alleged to be a tenant in possession of part of the land taken, cannot be considered by the Court of Appeals, when there is no evidence in the record to show that he was such tenant, or that his holding was such as to entitle him to be considered.

If the report of the Examiners was prematurely ratified by the Commissioners, that was a mere irregularity to be corrected on appeal to the Circuit Court.

Writ of error and appeal from the Circuit Court for Frederick County.

On September 6, 1892, the appellees, Goldsborough and Hoffman, gave public notice by due advertisement in "The Examiner," a newspaper published in Frederick County, that on the 17th day of October, 1892, they intended to petition the County Commissioners of Frederick County, for the locating and opening of a public road in that county described in their notice. This notice was published once a week, for six successive weeks, prior to the 17th day of October, 1892. On that day they filed their petition with the County Commissioners, alleging that they are citizens of Frederick County, that they had given the notice in question, a certified copy of which they filed with their petition, that the notice was duly published for thirty days, that the public convenience requires the opening of the road, and they therefore prayed for the opening of the road according to law. This petition was duly sworn to by Charles W. Goldsborough, but did not appear to have been signed.

The County Commissioners thereupon passed an order setting the petition and any counter-petitions that might be filed down for hearing on the 21st day of November, 1892, and ordered the clerk of the board to give notice to the owners of the land through which it was proposed to locate and open the said road, that the matter would be taken up on the 21st of November, 1892. Subsequently a number of citizens and tax-payers of the county, including some of the appellants, filed with the County Commissioners a protest against the granting of the petition.

The Commissioners heard counsel and witnesses on both sides, after service of notice on the parties in interest; and also visited the locality in person in order to decide whether the proposed road was required by public convenience. On March 30, 1893, they appointed R. A. Rager, special surveyor, to make a plat of the proposed road, upon the location determined upon by them. After the return of his

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survey the Commissioners passed an order, on April 18, 1893, reciting their previous action and deciding that "upon consideration of said report, location, survey and plat so made by the said Rufus A. Rager, it was and is further ordered that the same be, and it is hereby approved, as and for the location, survey and plat of said new public road, which as hereinbefore recited and declared, the Board of County Commissioners of Frederick County have determined and decided, and do determine and decide that the public convenience of said community requires to be opened, the same differing somewhat from the line of the public road petitioned for by said Goldsborough and Hoffman, but being laid out, surveyed, located and platted according to the decision of this board as a public road, that will better serve the public convenience of said community than the road petitioned for by said Goldsborough and Hoffman, while at the same time it does not pass through the lands of any person or persons other than those mentioned in the petition of the said Goldsborough and Hoffman."

In an order passed on the next day appointing Examiners to appraise the damages which the several owners would sustain by the opening of the road, it was recited that the "County Commissioners have determined upon the location of said road which in their judgment will best promote the convenience of the community through which it is proposed such road shall run."

On June 20, 1893, the report of the Examiners was ratified in every particular, except that the amounts awarded as damages to Goldsborough and Hoffman were cut down to five dollars each. From this action the appellants appealed to the Circuit Court for Frederick County. Several motions to quash the proceedings were overruled by the Court (LYNCH and VINSON, JJ.), and on January 11, 1894, a jury rendered a verdict for the petitioners and assessed the damages. A motion in arrest of judgment was overruled and the Court ordered and adjudged that the public road as laid down upon the survey, etc., be opened as a county road by



the County Commissioners, and that before said road is opened the said Commissioners pay or tender the sums assessed as damages by the jury.

Thereupon the appellants prayed that the record might be removed to the Court of Appeals, as upon writ of error, assigning eighteen reasons.

The cause was argued before ROBINSON, C. J., BRYAN, BRISCOE and BOYD, JJ.

*William P. Maulsby, Jr.*, and *Milton G. Urner* (with whom were *J. Roger McSherry*, *Clayton O. Keedy* and *Hammond Urner*, on the brief), for the appellants.

The only question involved is one of jurisdiction. If the Circuit Court for Frederick County was without jurisdiction to pass the judgment appealed from, then the case is properly in this Court, either upon the appeal or writ of error. This proposition is too well supported by numerous decisions of this Court to require a citation of authorities here, but see: *Mears v. Remare*, 33 Md. 246; *Burrell v. Lamm*, 67 Md. 580; *Poe's Plg. and Practice*, vol. 2, sec. 826. "If the County Commissioners had no jurisdiction the Circuit Court would have none." *Greenland v. Co. Comms. of Harford Co.* 68 Md. 63.

This is a case in which the private property of the citizen is sought to be taken for public use against his consent. The power to do this is primarily conferred by law upon the County Commissioners, a tribunal of limited jurisdiction. They are required to act *strictly* within the jurisdiction conferred upon them by the law and there is no legal presumption in favor of their jurisdiction, but every jurisdictional fact must affirmatively appear upon the face of the record. *Winchester v. Co. Comms. Cecil County*, decided Oct. Term, 1893; *Friedenwald v. Shipley*, 74 Md. 228 *et seq.*; *Barrickman v. Comms. of Harford Co.* 11 G. & J. 56; *Chicago v. Rock Island R. R. Co.* 20 Ill. 286; *Hall v. Howd.*, 10 Conn. 520; *Sharp v. Speir*, 4 Hill 76-89.

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Argument of Counsel.

Before the County Commissioners of Frederick County can exercise the extraordinary power of divesting a citizen of his property for the purposes of a public road there must be: 1. A publication of a notice of an intention to petition. 2. The filing of a petition duly signed. 3. A determination by the Co. Commissioners that the *public* convenience requires a road. 4. A determination by the Commissioners upon the location which in their judgment will best promote the public convenience. (Act 1892, chapter 426, secs. 95 A and 95 D.) 5. The valuation and ascertainment of "the damage that may be sustained by each person through whose lands the road will pass."

Without the filing of a proper petition the County Commissioners could have no jurisdiction. The signature of the petitioner to the paper filed as a petition is absolutely necessary to give it validity. The sound and invariable practice has been to require all papers addressed to any tribunal to be signed. This practice is founded upon wise policy and we know of no exception to the rule.

"No bill can be regularly filed without being signed in person or by counsel." *Eveland v. Stevenson*, 45 Mich. 396; *Wright v. Wright*, 8 N. J. Eq. 153; *Chitty's Equity Index*, 5 vol. page 5323. "The declaration has always been required to be signed by some one, *in all Courts*, and this signature is usually the test to determine who appears." *Benalleck v. People*, 31 Mich. 203. Exceptions filed to an answer in Chancery must be signed. *Hitchcock v. Rhodes*, 42 N. J. Eq. 496. A protest against the assessment of duties under Act of Congress of June 10th, 1890, is required to be signed. See opinion of Judge Somerville, June 22d, 1893. Decisions of Genl. Apps. 2197. The necessity of the signature has been recognized by this Court in *Galloway v. Shipley*, 71 Md. 243; *Gaither v. Watkins*, 66 Md. 576; *Bragunier v. Penn*, 79 Md.

But even if the petition had been signed, it was necessary that all further proceedings should affirmatively appear to be within the scope of the jurisdiction conferred. *Whitely v.*

*Platt Co.*, 73 Mo. 31; *Sharp v. Spier*, 4 Hill, 84; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Tireman v. Drain Comrs.*, 40 Mich. 177; *Lane v. Burnap*, 39 Mich. 736; *Windsor v. McVeigh*, 93 U. S. 274-284.

While the Commissioners selected a location different from the one petitioned for, and one which in their opinion would *better* serve the public convenience, they did not select the one which would *best* promote the public convenience in their opinion, as they were required to do before they could proceed further. They were not authorized to open any other road. This is a substantial and important requirement and the property owners, as well as the public, have a right to insist that it be complied with. The failure to comply vitiates the proceedings. The judgment entered of record shows what the Commissioners determined, and we can look alone to that to ascertain their determination or judgment. The recital in the commission to the Examiners subsequently issued, and which was only authorized to be issued *after* the determination upon the location that would in the judgment of the Commissioners *best* promote the public convenience, could not, even if it had been in proper form, cure the defect of the previous judgment. "The validity of an order cannot be presupposed for the purpose of proving by its recital that a preliminary step essential to its validity was actually taken." *Tefft v. Hamtranck*, 38 Mich. 560.

The commission was issued to Examiners, notwithstanding the preliminary requirement had not been complied with, and who were required to make their return on the 6th day June, 1893. The Examiners proceeded in the execution of the commission, but utterly ignored the rights of one F. T. Musser, the lessee in possession of one of the farms, through which the road was to run. He was an "owner" within the meaning of the law. *Piedmont & Central R. R. Co. v. Spielman*, 67 Md. 275; *B. & O. R. R. Co. v. Thompson*, 10 Md. 80; *N. Penn. R. R. Co. v. Davis*, 26 Pa. St. 238; *Lister v. Loblely*, 7 A. & E. 86; *Watson v. N. Y. Cent. R. R. Co.*,

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47 N. Y. 162; *Rentz v. City of Detroit*, 48 Mich. 547. *Lewis on Eminent Domain*, Secs. 335 and 341.

The judgment of the Circuit Court was *coram non* for the additional reason that it had no power or authority to enter the same upon the verdict rendered. The verdict was simply "For the petitioners and assess damages to, &c."

That verdict was clearly defective. It did not describe the road they found would best promote the public convenience, if they intended to find any such fact. This case was in the nature of a proceeding *in rem* and the verdict should have sufficiently described the *res*. Assuming that Goldsborough and Hoffman filed a petition, this petition was for a different road from that the Commissioners attempted to locate, and if the verdict has any meaning at all it is that the jury found in favor of the road petitioned for by the "Petitioners." But a public road is not the "Petitioners' " road.

The owner of property has a constitutional right to have a jury pass upon the question and render a verdict that is clear and explicit before his property can be taken. The Court has no right to make a verdict for the jury. *Gaither v. Wilmer*, 71 Md. 361; *McKnew v. Durvall*, 45 Md. 511; *State v. Carleton*, 1 Gill, 259; *Hughes v. Howard*, 3 H. & J. 11; *Negro Bell v. Jones*, 10 Md. 332; *Miles v. Knott*, 12 G. & J. 310; *Holmes v. Wood*, 6 Mass. 2.

On appeal the Circuit Court had no authority beyond that given it by statute providing for the exercise of its jurisdiction on appeal, and the judgement it had power, *i. e.* jurisdiction to give was such an one as the Commissioners should have given. The Court had no jurisdiction to give a judgment in any wise except upon the facts found by the jury. What fact was it essential that the jury should find to enable the Court to give such judgment as the Commissioners should have given? Plainly, we submit, the fact to be ascertained by the jury was what location of road would *best* subserve the public convenience. But the jury never found by their verdict any road or location whatever as *best* suited

to subserve the public convenience. How then can it be contended that there ever was an exercise of the jurisdiction of the Court to render such judgment as the Commissioners should have rendered, when the very life of the whole matter, the *best* road, was never passed on at all by the jury?

\**John P. Poe*, Attorney-General, for defendants in error and appellees; *Frederick J. Nelson* for the appellee, Goldsborough; *John C. Motter* and *J. E. R. Wood* for the appellee, Hoffman.

BOYD, J., delivered the opinion of the Court.

This case was commenced by an application by Charles W. Goldsborough and George W. Hoffman, the appellees, to the County Commissioners of Frederick County, for the opening of a public road in that county, and the question presented for our consideration is whether the Circuit Court had jurisdiction to enter the judgment complained of on an appeal taken to that Court from the decision of the County Commissioners. It must be, and is conceded that this Court has no authority to review the action of the lower Court if the latter had jurisdiction in the premises and that question is presented by a motion to dismiss the writ of error and appeal.

In the Circuit Court the appellants filed a motion to quash the proceedings before the County Commissioners, and afterwards made a motion in arrest of the judgment. The petition for the writ of error assigns eighteen reasons why the appellants feel aggrieved at the decision below. Many of the points raised manifestly do not affect the question of jurisdiction and were not presented in this Court, but it was earnestly contended by the learned attorneys for the appellants that there were certain defects in the proceedings which are jurisdictional questions, and which we will therefore consider.

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\*The Court declined to hear counsel for the appellees.

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Sec. 83 of Art. 25 of the Code of Public General Laws provides that "All applications for opening, altering or closing roads shall be by petition to the County Commissioners." Sec. 84 provides that when any citizen of any county intends to petition the County Commissioners for opening, altering or closing any road, he shall give thirty days notice thereof in one or more of the newspapers published in the county. Sec. 85 authorizes counter petitions to be presented. The Act of 1892, chap. 426, substitutes five sections for sects. 86, 87, 88, 89 and 90 of Art. 25, so far as they apply to Frederick County.

On Oct. 17, 1892, a petition was filed with the County Commissioners, but was not signed at the end by the appellees, or any one for them, and it is contended by the appellants that this was necessary to give the County Commissioners jurisdiction. It was addressed to the County Commissioners of Frederick County, and begins:

"Your petitioners, Charles W. Goldsborough and George W. Hoffman, respectfully represent unto your Honorable Board." It alleges that they are citizens of Frederick County, and that on Sept. 6th, 1892, they gave notice in the "Examiner," a newspaper published in said county, of their intention to petition to the Commissioners on the 17th Oct., 1892, for the opening of a certain public road described in the notice, a copy of which they filed, &c. It concluded with, "Your petitioners therefore pray your Honorable Board for the opening of said road according to law." An affidavit was annexed in which Charles W. Goldsborough made oath that the matters and things set forth *in the petition* are true, etc.

The copy of the notice published in the "Examiner" has the names of Charles W. Goldsborough and George W. Hoffman attached to it.

A counter petition signed by a large number of citizens and taxpayers of Frederick County, *including all the appellants*, was filed protesting "against the petition filed by Charles W. Goldsborough and George Hoffman for the

opening of a public road mentioned in said petition," etc. A few days afterwards Mr. and Mrs. Albaugh filed a more formal counter petition, and on Nov. 18, 1892, Michael F. Secrist, Elias V. Albaugh, Mary E. Albaugh and James W. Smith, by their attorneys, asked the Commissioners to fix a day for the hearing of testimony for the counter petitions filed and also as to the road petitioned for.

The record shows that the appellants were represented by attorneys in these preceedings before the County Commissioners, although it fails to show that any objection was made to the petition on the ground now being considered until Sept. 11th, 1893, when it was assigned as one of the reasons why the Circuit Court should quash the proceedings. It is perfectly apparent that the appellees adopted the petition as their own from the time it was presented to the Commissioners to the end of the case.

They could not avoid any liability which attached to the petitioners for public roads under the statute by reason of the fact that they had not signed the petition at the foot. It may be possible that they did actually sign it, and that the Clerk of the Commissioners omitted their signatures when making up the record. We do not want to be understood as basing our opinion on that possibility, however, and we only refer to it for the purpose of showing what injustice might be done by parties to such controversies waiting until the case is appealed to the Circuit Court and there, for the first time, raising the question. We must not overlook the fact that County Commissioners are ordinarily not lawyers or accustomed to or acquainted with technical pleadings. They are selected from the people at large and much of their business is transacted without the assistance of those learned in the law.

Whether or not the petition was in the handwriting of the petitioners does not appear from the record, but whether it was written by them or by some one for them, it was adopted by them, and although the proper place for their

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signatures is at the end of the petition, it would be valid if signed in some other part.

If some one else had signed the names of the petitioners at the end of this petition at their request, or if such signatures had been afterwards ratified by them by filing the petition with the Commissioners, one of them swearing to it, and both endeavoring to sustain it before the Commissioners and in the Circuit Court, could it be successfully contended that it was not their petition? This Court in *Higdon v. Thomas*, 1 H. & G. 139, and in *Drury v. Young*, 58 Md. 546, decided that it is immaterial in what part of an instrument the name appears in order to comply with the requirements of the Statute of Frauds. The sections of that statute under consideration in these cases require the memorandum, etc., to be signed by the party or his agent, whilst the statute under which this proceeding was commenced does not so require in terms, although it was doubtless intended that the petition should be signed or adopted in some way so as to avoid any question as to who the petitioners were. Under the circumstances of this case there can be no doubt about the fact that the appellees were the petitioners, and that they would be responsible for costs and such other liabilities as might attach to parties petitioning for public roads. The omission to sign their names at the end of the petition was a mere irregularity, and did not render the petition or the subsequent proceedings void, or prevent the Commissioners from taking jurisdiction of the case. To hold proceedings before County Commissioners to such technical accuracy might render nugatory and void many transactions in reference to public roads and other matters.

No technical pleading is required or contemplated by the law in matters before them. Whilst it is true that their jurisdiction is limited, Courts should not be eager or inclined to interfere with their control over matters intended for them, because the proceedings have not been conducted in the regular and orderly way that is to be expected in Courts of



record, where the business is transacted by those especially trained for the purpose.

This is particularly so when the parties raising the technical objections have not been in any way injured thereby and recognized the validity of the instrument, so far as the alleged defects are concerned, by their conduct throughout whilst the case was still before the Commissioners.

Following the order of questions presented by appellant's brief, the next point is that the Commissioners had no jurisdiction to proceed to take private property or appropriate public funds for a public road until they had determined "upon such location or route as in their judgment will *best* promote the public convenience," as required by the Act of 1892, Chap. 426, Sec. 95A; and that the record of the action of the Board does not show this to have been done.

On March 22nd, 1893, the Commissioners, upon consideration of the petition of the appellees and of the counter-petitions, passed an order that the board visit, as a body, the locality in which it was proposed to open the public road petitioned for, to ascertain the required convenience of the community, &c., which order was authorized by and followed very closely the exact language of Section 95A. On the 30th of March, 1893, the Commissioners appointed a surveyor to survey and make a plat of the proposed new road upon the location determined upon by them. The survey and plat were made and returned to the Commissioners by the surveyor on April 4th, 1893. On April 18th, 1893, the board filed an order in which they recited the transactions in considerable detail, and after referring to their visit to the locality, stated that they "did ascertain and determine that the *public convenience* of said community *does require* the opening of a new public road in said locality, but did also ascertain and determine that the public convenience of said community will be better served by the adoption of a location somewhat different from that mentioned in the said petition of said Goldsborough and Hoffman."

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Almost the exact language of the statute is used in the above quotation—the statute adding, however, that if they determine the facts stated above “they shall cause a survey and plat of the proposed new road or alteration to be made by a competent surveyor upon such location or route as in their judgment will best promote the public convenience.” The latter is the language relied on by the appellants. In the above mentioned paper the board, after further reciting the appointment of the surveyor, his return and plat, their approval of it, &c., then concludes as follows: “And upon consideration of all the premises the Board \* \* \* \* do now adjudge and determine that the *public convenience* of the community through which said new public road is prayed and proposed to be opened *does require* that the said *new public road*, as *laid down upon said survey and plat of said Rufus A. Rager*, surveyor appointed to make the same, *shall be opened*, and it is thereupon, on this 18th day of April, 1893, accordingly so ordered and determined.”

It is difficult to see how the determination of the Commissioners that the road as laid down on the plat of the surveyor would “best promote the public convenience,” could be more clearly or more forcibly expressed than to say that the public convenience *required this particular road* to be opened. The use of the word “better” instead of “best,” in the connection in which it was used, simply followed the exact language of the statute, and when it was said that the public convenience *required* the adoption of the road laid out by the surveyor that embraced the fact that it would *best promote* the public convenience. But if there were any room for contention on that question the order of the Commissioners appointing Examiners recites that the “Commissioners have determined upon the location of said road, which in their judgment *will best promote* the convenience of the community.” One order is as much a part of the record as the other. There is nothing in the statute which would prevent the Commissioners from stating their

determination as to the public convenience, etc., in the order appointing the Examiners.

The objection urged that the Examiners, in proceeding to execute the commission, ignored the rights of one F. T. Musser, who is alleged to be a tenant in possession of the farm of James W. Smith, cannot be considered by this Court. There is no evidence in the record that he was such tenant or, if he was, that his holding was such as to entitle him to be considered. His tenancy, for example, might have expired before the road could be commenced.

If there was any error in ratifying on June 20th, 1893, the report of the Examiners, which was filed June 3d, 1893, it is clearly not a jurisdictional question. If it be admitted that the confirmation was premature, which we do not decide was the case, it was a mere irregularity to be corrected on appeal to the Circuit Court. *Gaither v. Watkins*, 66 Md. 582.

So far as the form of the verdict and the judgment of the Court thereon are concerned, this Court is powerless to give the appellants any relief, if we assume there was error, as the law has not given it authority to review the decision of the Court below. The latter had jurisdiction to enter up the judgment and whether properly done or not its action cannot be reviewed by us.

We have thus referred to the principal points raised by the appellants, and have also carefully examined the other reasons assigned as errors, and we are of the opinion that the County Commissioners and the Circuit Court had jurisdiction in the case, and the action of the latter is final. Sections 81 and 82 of Art. 5 (which are still in force in Frederick County, as they were not repealed by the Act of 1892) authorize an appeal from the County Commissioners to the Circuit Court, where either party has a right to a trial by jury.

That Court is, by Section 82, "authorized to ratify, reject, alter or amend the proceedings before the County Commissioners and in said Court, so as to bring the merits of the

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case fairly to trial, and the said Court is hereby further authorized to pass such judgment in the case as the County Commissioners ought to have passed, including costs; *and such judgment shall be final* and may be enforced by due process of law."

The powers thus given are very broad. The County Commissioners have original jurisdiction conferred on them, the Circuit Court is the Appellate Court and no right of appeal is given to this Court.

The record in this case discloses the fact that the proceedings before the Commissioners were conducted with great care and unusual particularity. The omission of the signatures of the petitioners at the usual place is the only evidence of any want of care, which was doubtless a mere oversight, and we have determined that there is nothing in that omission to render the proceedings void. The orders passed, the notices given and other acts done meet the requirements of the statute—certainly so far as they affect any jurisdictional questions. Such being the case and the Circuit Court having jurisdiction as the Appellate Court and its judgment being made final by the language of the statute, it follows that this Court is without authority to review the action of the Court below as has been determined by numerous cases in this State.

We will only refer, in addition to 66 Md. 582, *supra*, to *Greenland v. County Commissioners*, 68 Md. 62; *Rayner v. State*, 52 Md. 374; *Judefind v. State*, 78 Md., and *Moores v. Bel Air Water Company*, decided at the last term of this Court.

It follows from what we have said that the writ of error must be quashed and the appeal dismissed.

*Writ of error quashed and the appeal dismissed.*

(Decided November 14th, 1894.)

JOHN H. HUNT, EXECUTOR OF ROBERT S. HUNT,  
vs. JOHN F. GONTRUM, TRUSTEE, ETC.

*Liability of Trustees—Collecting Notes—Investment of Trust Funds—  
Acquiescence of cestui que trust.*

A trustee to whom a sum of money is bequeathed has no right to accept from the executor of the testator a promissory note of a third person, in part payment of the legacy ; and if he does accept it, he ought to proceed at once to collect the same.

If at the time of accepting such note it could be collected, and the trustee neglects to do so for some years until the maker becomes insolvent, his estate is liable to make good the loss to the trust fund.

In the absence of express authority in the instrument creating the trust, a trustee has no right to invest the funds in personal securities, and if he does, he makes the investment at his own peril ; and even where the investment is left to his discretion, it is not the exercise of a sound discretion to invest in such securities.

If a trustee makes an improper investment of the trust fund at the request of the *cestui que trust*, or if the *cestui que trust* consents to the investment, the trustee will not be held liable to make good a loss arising from the same. But to relieve the trustee from liability in such cases, the *cestui que trust* must be *sui juris*, and capable of acting for himself, and the acquiescence must be with full knowledge of the facts, and with knowledge as to his legal rights.

Appeal from a decree of the Circuit Court for Anne Arundel County (JONES, J.), made on May 24, 1894, by which it was adjudged that John F. Gontrum, trustee of the estate of William Galloway, under the last will of Miriam R. Lyons, deceased, recover against John H. Hunt, executor of the last will of Robert S. Hunt, deceased, the sum of \$692.80, with interest, &c. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and BOYD, JJ.

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*James M. Munroe*, for the appellant, cited: *Perry on Trusts*, (4th Ed.), secs. 440, 467, 849-851, 870; *Waring v. Darnall*, 10 G. & J. 140.

*J. Wirt Randall* and *Daniel R. Randall*, for the appellee, cited: 1 *Lewin on Trusts*, 287, 288, 317; 1 *Perry on Trusts*, secs. 440, 452, 453; *Beach, Mod. Equity Juris.*, secs. 245, 263, 265; *Hill on Trustees*, 382, 525; *Harrington v. Keteltas*, 47 N. Y. 40; *Wayman v. Jones*, 4 Md. Ch. 500; *Mac-cubbin v. Cromwell*, 1 G. & J. 167; *Ringgold v. Ringgold*, 1 H. & G. 11; *Hoffman Steam Coal Co. v. Cumberland, etc., Co.*, 16 Md. 508; *Zimmerman v. Fraley*, 70 Md. 561; *Bentley v. Shreve*, 2 Md. Ch. 218; *Diffenderffer v. Winder*, 3 G. & J. 342; *Bispham's Principles of Equity*, 183.

ROBINSON, C. J., delivered the opinion of the Court.

Mrs. Miriam R. Lyons died in 1875, and by her will she bequeathed to Robert S. Hunt one thousand dollars "in trust for the sole use and benefit" of her nephew, William Galloway. Instead of demanding the payment of this legacy in money, as it was the plain duty of the trustee, he accepted from the executor of Mrs. Lyons certain promissory notes held by him, and among these notes was one of Thomas J. Perry, dated June 25th, 1878, for the payment of \$451.92. The interest on this note was regularly paid by Perry to the trustee till 1885, but from that time no interest has been paid nor were any steps taken by the trustee to enforce the collection of the note. Perry died 1888, and his estate it is said is insolvent; and Hunt, the trustee, died 1889. This is a proceeding by the appellee, appointed trustee in the place of Hunt, against Hunt's executor, to recover the loss sustained by the *cestui que trust*, on account of the Perry note.

The case was submitted to the Court below upon a written agreement of counsel, and the questions submitted for its determination, are whether Hunt, trustee, ought and could have reduced the Perry note to money? And secondly,

whether Galloway, the *cestui que trust*, acquiesced or consented to the breach of trust of the trustee?

That it was the duty of the trustee to have taken proper steps at once to collect the money due on the note, there can be no question. He had no right in the first place to accept the assignment of the note from Mrs. Lyons' executor in part payment of the legacy, but ought to have demanded its payment in money. And if he did accept it, he ought to have proceeded at once to collect the note. In the absence of express authority in the instrument creating the trust, a trustee has no right to invest trust money in *personal securities*, and if he does, he *makes the investment at his own peril*. And even where the investment is left to his discretion, it is well settled that it is not a sound discretion to invest in such securities. *Walker v. Symonds*, 3 Swans, 62; *Drake v. Martyr*, 1 Beav. 525; *Vigrass, v. Binfield*, 3 Madd. 62. In *Holmes v. Dring*, 2 Cox, 1, Lord Kenyon said: "No rule was better established, than that a trustee could not lend on mere personal security and it *ought to be rung* in the ears of every one who acted in the *character of trustee*."

It is equally clear, too, we think, that the trustee could have collected the money due on this note if proper steps had been taken to enforce its payment in 1878, when it was assigned to him. Perry was at that time the owner of a farm containing 123 acres, for which he paid \$3,000, and the only lien upon it from 1883 down to his death in 1888 was a mortgage of \$800. He had besides personal property worth at least \$600. Doctor Franklin, the executor of Mrs. Lyons, says he was at the time of the assignment a prosperous farmer and he considered him perfectly good for the payment of the note. Now there is testimony to show that when Perry died in 1888, ten years after the note had been given in part payment of the legacy, his estate was insolvent, but his ability to pay a note of \$451 in 1878, *is not to be decided by his pecuniary condition in 1888*. In the mean time his real estate had depreciated in value, part of his personal

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property was gone—had in fact diminished one-half in value; and besides he had incurred other debts and liabilities. So, looking to the proof in the record before us, we are satisfied that this note could have been collected by the trustee if he had taken the proper steps for that purpose.

And this brings us to the remaining question whether there was any *consent* or *acquiescence* on the part of Galloway, the *cestui que trust*, to the breach of trust by the trustee. If a trustee makes an improper investment of the trust fund, at the request of the *cestui que trust*, or if the *cestui que trust* acquiesces or consents to the investment, the trustee will not be held liable to make good the loss arising from such investment. But to relieve the trustee from liability in such cases, the *cestui que trust* must be *sui juris* and capable of acting for himself, and the *acquiescence* must be with full knowledge of the facts and circumstances and with knowledge as to his legal rights. In *Walker v. Symonds*, 3 Swans, 62, where the law on this subject was fully considered by Lord Eldon, a deed of compromise by a *cestui que trust* was rescinded and the co-trustees held responsible for the loss of the trust fund, on the ground that the *cestui que trust* had not proper information of her own rights and the liabilities of the trustees at the time of the execution of the deed.

In this case it cannot be said that the acceptance of the Perry note was done at the request or with the consent of Galloway the *cestui que trust*, for he was at that time but eight years old. Nor do we find any acquiescence on his part after his arrival at age in the breach of trust committed by the trustee. He did in 1885 write to the trustee requesting him to deliver to him, Galloway, the several notes held in trust for him, and did express his willingness to accept the notes, but at the same time he says, "*I presume they could be collected at any time.*" He did not know nor had he a right to assume that one of these notes, the Perry note constituting almost one-half of the trust fund, was insolvent. He supposed, as he says, that the notes were good and



could be collected at any time. By no fair rule of construction can this letter of the *cestui que trust* be construed as an acquiescence on his part, with full knowledge of all the facts and circumstances connected with this note and with knowledge of his legal rights and the liability of the trustee for the failure to enforce the payment of the note at a time when Perry was solvent. We agree, therefore, with the learned Judge below that Hunt's estate must be held liable for the loss of the trust fund arising from the insolvency of the Perry note.

*Decree affirmed.*

(Decided November 22nd, 1894.)

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MARY O. DEVOE, BY HER HUSBAND AND NEXT FRIEND,  
THOMAS B. DEVOE, AND HENRY G. WHEELER  
vs. MARTHA M. SINGLETON.

*Bills of Exception—Question and Answer—Cross-Examination.*

Where the bill of exceptions fails to set forth the purport of the answer made by a witness to the question excepted to, the judgment will not be reversed, although it may have been error in the Court below to allow such question to be asked, because the Court of Appeals cannot see from the record that the appellant was injured thereby.

Where a question would be proper on cross-examination, provided there was any testimony in chief on which to base it, the refusal of the trial Court to allow a witness to be asked the question will not be considered error when the record does not disclose the existence of such testimony.

Appeal from the Circuit Court for Harford County.

The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS, BOYD, JJ.

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Argument of Counsel.

*Thomas H. Robinson*, for the appellants.

The testimony of William H. Michael and Samuel Gibson as to the mental capacity of William L. Wheeler as set out in the first and third bills of exception, was certainly inadmissible according to the rule laid down by this Court. They are not medical experts, they are not subscribing witnesses to the will, and they have not shown such a *knowledge* of the testator as would enable them to form a rational opinion of his mental capacity, and nothing in fact upon which they could express such an opinion. *Brook v. Townsend*, 7 Gill, 10-28; *Waters v. Waters*, 35 Md. 541; *Dorsey v. Warfield*, 7 Md. 65; *Weems v. Weems*, 19 Md. 334; *Kerby v. Kerby*, 57 Md. 360; *Stewart v. Reddit*, 3 Md. 78.

The second exception is to the ruling of the Court below in reference to the testimony of the witness William H. Michael on cross-examination. In the examination in chief of William H. Michael, defendant's counsel asked the witness "if from his knowledge of William L. Wheeler, he, Wheeler, was, in his opinion, competent to execute a valid deed or contract, on the 25th day of April, 1892, and able to make an intelligent and proper disposition of his estate by will." The witness having answered the above question in the affirmative, the plaintiffs and caveators' counsel, on cross-examination, read the paper-writing purporting to be the will of said William L. Wheeler, to the witness, William H. Michael, and then asked him the following question: "Do you think the disposition of the property made by this will an intelligent and proper one?" The defendant and caveatee objected to this question, and the Court sustained the objection and refused to allow it to be answered. This was a proper question and the Court erred in refusing to allow it to be answered; the will had been produced in evidence and its contents were properly to be considered by the jury, in connection with the witness' testimony, in order that they might judge of the weight to be given to the latter. *Waters v. Waters*, 35 Md. 537.

*George Y. Maynadier* and *J. Royston Stifler*, for the appellee.

The *first* and *third* exceptions may properly be considered together, as they substantially present the same question—and that is: Can a non-expert witness be allowed to give his opinion as to the mental condition of a testator, after testifying to the facts of his (witness') business and other intercourse with him, covering a long period prior to testator's decease, including the date of the will? That the evidence of the witnesses, Michael and Gibson, "among other witnesses" to the same purport whose testimony was unobjected to, was properly admitted by the Court to go to the jury, after their several statements of their respective business and other relations with William L. Wheeler, the testator, during the period in question, so as to enable the jury to properly estimate the weight to which it was entitled, is, we submit, clearly settled in this State by the authority of reason and the decided cases. *1st Redfield on Wills*, (3d Ed.), 140, 141, 143, 144, (the last reference stating Md. decisions) *et seq.*; *Davis v. Calvert*, 5 G. & J. 300, 301; *Townshend v. Townshend*, 7 Gill, 27, 28, *Dorsey v. Warfield*, 7 Md. 73; *Weems v. Weems*, 19 Md. 334; *Waters v. Waters*, 35 Md. 541-42; *Tyson et al. v. Tyson*, 37 Md. 582.

The reading of the will by appellants' counsel to witness Michael, and the endeavor to elicit his opinion as to the "intelligence" and "propriety" of its provisions *as a whole*, is unsupportable on principle, and has heretofore received the express condemnation of this Court. *Waters v. Waters*, 35 Md. 538.

FOWLER, J., delivered the opinion of the Court.

Issues involving the validity of the will of the late William L. Wheeler were sent from the Orphans' Court of Harford County to the Circuit Court thereof, to be tried before a jury, and during the trial three exceptions were taken by the plaintiffs to the rulings of the Court below as

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to the admissibility of certain testimony. In regard to the first exception it is sufficient to say that even assuming that there was error in allowing the witness, Michael, to answer the question as to whether the testator was competent in the opinion of the witness to execute a valid deed or contract at the time of the execution of the will, yet the answer is absent from the record, and it is therefore impossible for us to know what it was. It may have been either injurious or beneficial to the plaintiffs. The answer of the witness not having been set forth in the bill of exceptions, it does not appear that the plaintiffs were injured thereby. In order to justify a reversal there must be both error and injury apparent from the record. *Lawson v. Price*, 45 Md. 123; *Turnpike Co. v. Crowther*, 63 Md. 558; *Same v. State*, 63 Md. 578, and *Commissioners of Calvert County v. Gantt, Tax Collector*, not yet reported—see 28 Alt. Rep. 101.

In the case last cited we held that the refusal to allow a proper question to be answered is in itself a reversible error. "If the question was in itself a proper and pertinent one," says ROBINSON, C. J., who delivered the opinion of the Court, "it was quite unnecessary for the defendant to state the purpose for which it was offered. The record does not, it is true, show what would have been the answer to the question, and this the record could not show, for the reason that the witness was not allowed to answer." And these remarks apply to the second exception. The Court below refused on cross-examination to allow the same witness, Michael, after the will was read to him, to answer the question as to whether he thought the disposition of the property thereby made by the testator was an intelligent and proper one. Perhaps this question would have been proper on cross-examination if there were any testimony in chief on which to base it, but so far as the record shows there was none whatever, and the Court committed no error in refusing to allow the witness to answer.

What we have said in regard to the first bill of excep-

tions applies also to the third, for it appears that the witness was allowed to answer the question objected to, but the answer is not set forth in this record.

*Rulings affirmed.*

(Decided November 22d, 1894.)

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## JOHN JENKINS vs. THE STATE OF MARYLAND.

### *Assault with intent to kill—Evidence.*

Upon the trial of an indictment for an assault with intent to kill, it is not competent, on cross-examination, to ask the prosecuting witness, upon whom the assault was made, whether he had not, within a year, pointed a weapon at a third party with the intention of shooting him.

Where there is no evidence of any hostile demonstration against the traverser at the time of the assault, but his sole reliance for a justification of the attack is that on the preceding day the prosecuting witness uttered threats against him, he cannot be asked what interpretation he put upon the language then used by the prosecuting witness.

Appeal from the Circuit Court for Montgomery County.

The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE and BOYD, JJ.

*Thos. Anderson* and *Wm. Veirs Bouic, Jr.*, for the appellant.

*John Prentiss Poe*, Attorney General, for the appellee, cited : *Gaither v. Blowers*, 11 Md. 552 ; *Turpin v. State*, 55 Md 473-5 ; *Spencer's case*, 69 Md. 47 ; *Fenwick's case*, 63 Md 241.

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Argument of Counsel.

*Edward C. Peter, State's Attorney for Montgomery County*, filed a brief for the appellee.

The record in this case does not disclose any testimony tending to prove that Jenkins acted in self-defense when he assaulted and shot Smith, and in the absence of such evidence it was clearly inadmissible for the traverser to prove that Smith was a violent and dangerous man, or that he had the day previous to the assault made threats against Jenkins. *Turpin v. State*, 55 Md. 463; *Am. and Eng. Enc. of Law*, Vol. 9, 672 and 683; *Wharton's Crim. Ev.*, 8th Ed., 69 and 657.

If this had been a case in which the character of Smith would have been competent evidence, the traverser would have been confined to proof of Smith's general reputation as a violent and dangerous man, and evidence of specific acts of violence toward a third person would have been excluded. *State v. Elkins*, 63 Mo. 165; *State v. Abarr*, 39 Iowa, 189; *Dupree v. State*, 33 Ala. 388; *Franklin v. State*, 29 Ala. 20; *State v. Rosalana Duse*, 103 N. Y. 655; *Eggler v. State*, 56 N. Y. 342; *Thomas v. State*, 67 N. Y. 218; *Nicholls v. State*, 23 Hun. 156; *Alexander v. State*, 105 Pa. St., 1.

The traverser was allowed the greatest latitude in presenting to the jury evidence of all that transpired in the difficulty that occurred between him and Smith the day previous to the shooting, and the remark then made by Smith, "I have your age in my pocket," accompanied with the gesture of putting his hand to his hip pocket had no uncertain or ambiguous meaning. It was a threat, the full force of which the jury could appreciate, and it was unnecessary for their enlightenment to know what Jenkins understood Smith to mean.

BRISCOE, J., delivered the opinion of the Court.

This is an indictment in the Circuit Court for Montgomery County, for assault with intent to kill. The traverser was convicted and sentenced to an imprisonment of five years in

the penitentiary. At the trial he reserved two bills of exceptions to the rulings of the Court upon the admissibility of testimony and these form the basis of this appeal. In the first bill of exception, it is stated that the traverser after having proved that Smith, the party upon whom the assault was made, was a dangerous man and had been tried and convicted on several occasions of various offenses, asked him on cross-examination, "if he had not within the last year leveled his gun on Mr. Wm. Barlow Vincent with the intention of shooting him," offering at the time to follow it up by showing that the traverser at the time of the shooting had knowledge of Smith's act. The alleged purpose being to show to the jury that the traverser knew that he was dealing with a dangerous man, who had the day previous drawn his revolver upon him and threatened to kill him.

This proposed testimony was entirely irrelevant and was properly excluded by the Court. The witness was not bound to answer the question put to him, because the answer manifestly tended to criminate himself. But independent of this, the fact that Smith, the prosecuting witness, had pointed a gun at a third party on a former occasion, would not justify the traverser for assaulting Smith. Nor would it tend to reduce the offence to a common assault or entitle the party to an acquittal. Specific acts of violence were not admissible. The general reputation of the party assaulted as a dangerous man had been introduced and was before the jury. *Gaither v. Blowers*, 11 Md. 553.

The second exception of the appellant was to the refusal of the Court to allow the prisoner to give in evidence what he understood Smith, the prosecuting witness, to mean by the words, "I have your age in my pocket," in connection with his act of immediately placing his hand in his hip pocket the day before the shooting, while at the traverser's brother's house. The object of the question was stated at the time to place in evidence before the jury, that the traverser knew by said declaration and act, that Smith intended to kill him, and that it was owing to this understanding and belief that

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induced to say, when he saw Smith coming, that he would have to shoot him rather than let him shoot the traverser. The rule as to the admissibility of such evidence is stated by this Court in the case of *Turpin v. The State*, 55 Md. 475 to be, "that unless proof be first given that there was an overt act of attack, and that the defendant at the time of the collision was in apparent imminent danger, such evidence is inadmissible." In the case now under consideration there was no proof given of any overt act of attack, nor any evidence that the appellant was at the time of the shooting in any apparent imminent danger. On the contrary, it is obvious from the testimony that the shooting was premeditated and without provocation. There was no proof of any hostile demonstration on the part of the prosecuting witness on the occasion of the shooting, but the sole reliance of the defence for a justification being alleged threats on the day preceding the assault. It was entirely competent for the traverser to testify as to his intent, and that was in evidence. The intent was a necessary allegation in the indictment and a fact material to the issue. *Roddy v. Finnegan*, 43 Md. 501; *Spencer v. State*, 69 Md. 46; *Fenwick v. State*, 63 Md. 239. The traverser had the benefit of this, and it was for the jury to pass upon its credibility.

It was also in evidence that the prosecuting witness had said to the traverser that "I have your age in my pocket," and that the traverser had told "Long Tom" Jenkins that he would have to shoot Smith. Jenkins remonstrated with him, but the traverser replied, "I might as well shoot him as to have him shoot me." In the face of this testimony, it is clear that the evidence offered in the second bill of exception was inadmissible. There is no evidence in the record tending to show that the traverser acted in self-defense when he made the assault. He had the benefit of all the evidence he was legally entitled to, and there being no error in the rulings of the Court, they will be affirmed.

*Judgment affirmed and cause remanded.*

(Decided November 22d, 1894.)



ELIHU E. JACKSON vs. WILLIAM C. BENNETT  
AND OTHERS.

*Oyster Beds—Appeal.*

No appeal lies from the determination of a Circuit Court that a lot in the waters of this State, located and appropriated by a party under Code Art. 72, Sec. 39, for the purpose of bedding oysters, is a natural bed or bar of oysters, and setting aside his location.

Appeal from the Circuit Court for Dorchester County.

On March 23, 1894, the appellees filed a petition in said Court setting forth that the appellant recently located and appropriated five acres in the waters of Holland's Straits, in Dorchester County, for the purpose of preserving, bedding or sowing oysters; that the said five acres are a natural bed or bar of oysters; that the appropriation thereof by the appellant would injure the petitioners in their right to take oysters from the same, and praying that the location might be annulled and vacated. The appellant demurred to the petition, and his demurrer being overruled, excepted. After hearing evidence, the Court below (LLOYD, J.) found that the oyster lot in question had been located by the appellant within twelve months before the filing of the petition; that the same is a natural oyster bed or bar, and ordered that the location be vacated and set aside.

The cause was argued before ROBINSON, C. J., MCSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Toadvin & Bell*, and *John R. Pattison*, for the appellant, submitted the case on brief.

*Phillips L. Goldsborough* and *Alonzo L. Miles*, for the appellees.

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ROBINSON, C. J., delivered the opinion of the Court.

Sec. 39, Art. 72 of the Code, provides that any owner of lands bordering upon any of the waters of this State, shall have the right to locate and appropriate in any of the waters adjoining his lands, one lot of five acres, for the purpose of protecting, preserving and bedding of oysters; and any male citizen of the State shall have the power to locate and appropriate one lot of five acres, and no more, in any of the waters of the State; provided thirty days notice in writing shall be given to the owner or occupant of land bordering on said waters; and provided, however, *that no natural bar or bed of oysters shall be so located and appropriated.* And the Code further provides, that if any one shall be charged with locating any natural bar or bed of oysters, contrary to the provisions of the statute, the question may be at once submitted by any person interested to the Judge of the Circuit Court of the county where such questions shall arise, who, after having given notice to the parties interested, shall proceed to hear testimony, "and his decision shall be recorded and shall in all cases be *conclusive evidence of title* in regard thereto."

Upon the petition of sundry citizens of Dorchester County entitled to take oysters within the waters of said county, the learned judge of the Circuit Court of that county, to whom the question was submitted, being of opinion that the lot located by the appellant *was a natural bar or bed of oysters*, adjudged that the appellant acquired no title to the lot in question, and ordered that the location thus made by him be set aside. And from this judgment this appeal is taken.

No principle is better settled than that where a tribunal exercises a *special jurisdiction conferred by statute*; its judgment is final and conclusive, unless the statute provides for an appeal. *Rundle v. Mayor & C. C., Balto.*, 28 Md. 356; *Page v. Mayor & C. C., Balto.*, 34 Md. 558; *George's Creek Co. v. New Central Coal Co.*, 40 Md. 425.

In the statute now under consideration no provision is

made for an appeal from the judgment of the Judge of the Circuit Court, upon whom this special jurisdiction is conferred; on the contrary, it provides that his decision in the premises shall be final and conclusive as to the title of the lot in question. And this being so, we have no power to review the judgment rendered by him.

*Appeal dismissed.*

(Decided November 22d, 1894.)

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## HENRY CLARK AND OTHERS vs. ROSA MANKO.

### *Married Women—Involuntary Insolvency.*

A married woman, trading as a *feme sole* trader, under Code, Art. 56, Sec. 36, is not subject to the provisions of Code, Art. 47, Sec. 23, relating to involuntary insolvency.

Appeal from the Court of Common Pleas of Baltimore City, in Insolvency.

The appellants filed a petition in said Court alleging that the appellee, a married woman, being a licensed *feme sole* trader under Code, Art. 56, had committed certain acts of insolvency, and had executed an assignment of her property for the purpose of hindering, delaying and defrauding her creditors and praying that she might be adjudicated an insolvent and a trustee appointed. The Court below (PHELPS, J.) dismissed the petition, being of opinion that the appellee was not within the purview of the insolvent laws and therefore not subject to the jurisdiction of the Insolvent Court.

The cause was argued before BRYAN, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*William J. O'Brien, Jr.* and *Joseph S. Goldsmith*, for the appellants, cited: 14 *Am. and English Ency. of Law*, 674, 675;

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Argument of Counsel.

*Wells on Separate Property of Married Women*, 196, 592; *Stewart on Husband and Wife*, secs. 473, 475, 476; *Bodine v. Killeen*, 53 N. Y. 93; *Young v. Gori*, 13 Abb. Pr. 13; *Ball v. Bullard*, 52 Barbour, 144; *Roan v. Hollingshead*, 76 Md. 369; *Lavie v. Phillips*, 3 Burrows, 1776; *Exparte Carrington*, 1 Atkyns, 206; *Hilliard on Bankruptcy*, 49; *Avery & Hobb on Bankruptcy*, 33; *In re Lyons*, 2 Sawyer, 524; *In re Kinkhead*, 3 Bissell, 404; *In re Collins*, 10 B. R. 335; *Graham v. Stark*, 3 B. R. 357; *Whyte v. Betts Machine Co.* 61 Md. 182; *Pinckney v. Lanahan*, 62 Md. 453; *Castleberg v. Wheeler*, 68 Md. 277; *Binney v. Globe Nat. Bank*, 150 Mass. 579; *In re Slichter*, 2 B. R. 336; *Home Bank v. Saneberg*, 131 Ill. 333; *In re Locke*, 2 B. R. 382; *In re Silverman*, 4 B. R. 523; *In re Book*, 3 McLean, 317; *Cruzen v. McKaig*, 57 Md. 458.

\**William A. Fisher* for the appellee.

FOWLER, J., delivered the opinion of the Court.

The sole question here presented is whether a married woman trading as a *feme sole* trader under the statute (Code Art. 56, section 36), is subject to and within the provisions of Code Art. 47, section 23, relating to involuntary insolvency. It has already been held by this Court in the case of the *Building Association v. Schmidt*, 55 Md. 97, that the provisions of the Code relating to voluntary insolvency before they were amended by the Act of 1880, Chapter 172, did not apply to married women, and we are all of opinion, notwithstanding the able argument of appellants' counsel, that the present law relating to involuntary insolvency, Article 47, section 23 of the Code, has no broader scope as to married women or *feme sole* traders. Prior to the Act of 1880, ch. 172, which amended the law as to voluntary insolvency, and added the provisions as now contained in the Code relating to involuntary insolvency, more than one

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\*The Court declined to hear counsel for the appellee.

attempt had been made in several of the circuits of this State to apply the then existing insolvent law to married women, but without success. The very case here relied upon by both sides, *Building Association v. Schmidt supra*, in which it was held that married women were not within the then insolvent law, was decided in the lower Court more than a year before the Act of 1880 was passed. If the Legislature had thought it wise to do so, it could easily have removed all doubt. But neither prior to the Act of 1880, nor by that Act itself, nor since its passage has there ever been any declaration of the Legislature that the insolvent law should include married women or *feme sole* traders. It is fair, therefore, to infer that no such intention ever existed. A large number of authorities were cited by the appellants to sustain their view, but we shall rest our conclusion upon the construction of our own statute, and the decision of this Court in the case before cited. And in view of the reasoning of this Court in that case it is, we think, evident that, whatever may be the rule elsewhere, we cannot agree to the contention of the appellants, that the necessary result of removing the disabilities of married women is to abrogate *all* rules based on such disability, and to bring them within the provisions of the insolvent law. We held in *Building Asso. v. Schmidt*, that notwithstanding the several acts relating to married women, which were passed for the purpose of removing common law disabilities, and to enable them to contract debts and to sue and be sued at law, "such acts can in no manner extend the provisions or affect the construction of the insolvent law, as we find it in the Code." We think the same language may be used in reference to the present insolvent law and the various laws now in force regulating the rights and liabilities of married women and *feme sole* traders. One of the Acts of Assembly we referred to in *Building Asso. v. Schmidt*, that of 1862, Ch. 49, in regard to *feme sole* traders which has been amended by the Act of 1880, Ch. 349, we there held did not have the effect here sought to be given to it by the appellant, that is

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to say, to affect the construction of the insolvent law as we find it in the Code.

It was argued, however, that what we said in 55 Maryland can apply only to the then existing insolvent law, as found in section 2, art. 48 of the Code of 1860. As we understand the contention of the appellant it is that the view announced in 55 Maryland was largely, if not altogether, owing to the fact that the law then required a deed from the insolvent debtor to the preliminary trustee, and that a married woman not being able to make a valid deed without her husband joining therein, the law as it then stood was very properly held not to apply to her, but that the Act of 1880, Ch. 172, changed the law in this respect, and no deed being now required, married women and *feme sole* traders are subject to its provisions. But if this be so, without so conceding, why may not infants also be subjected to the insolvent law, for they, like married women, and under the same Act, 1862, Ch. 49, as amended by the Act of 1880, Ch. 349, are made responsible and liable to be sued in a Court of law on all contracts authorized under said act, Code, Art. 56, sec. 36.

The appellants theory of this case is based largely upon the assumption that the insolvent law as we now have it has a wider application as to parties and is substantially different as to transfer of title from the debtor to the preliminary trustee from the law as it was before it was amended by the Act of 1880, and as it existed when construed in 55 Md. But in neither of these particulars do we think there is any substantial difference between the former and the present law. The former provides that "any person" being insolvent may as therein directed apply for the benefit of said law, and the latter has a like provision that "any person" who shall commit any act of insolvency therein mentioned shall, &c. The class contemplated by each law is in both cases described by the same expression "any person," and it would therefore seem to follow that both the old and the present law must be held to embrace the same persons, un-

less there be something in the contention of the appellants that formerly a deed was required to pass title from the debtor to the preliminary trustee, and that now no such deed is required. Of course it is conceded that the old law (sec. 2, Art. 48, Code, 1860), provided for such a deed, that being one of the reasons on which this Court based its decision in 55 Md. The section of the present Code relied on by the appellant to show that no deed is now necessary is section 23 of Art. 47, and its language is "When the Court shall have appointed a preliminary trustee all such estate and property (that is of the debtor) shall, as soon as the bond of such trustee shall have been approved, be divested out of the insolvent and be vested in the trustee; and *thereafter the same proceedings shall be had as hereinbefore prescribed in relation to persons who shall apply for the benefit \* \* \* of this Article.*" By referring to section 2 of same Article regulating proceedings as to applicants for the benefit of the insolvent law, we find that it is provided that after the appointment of a trustee, and the approval of his bond, the insolvent shall *immediatcly convey* to said trustee all his property, &c. It is true that under this section the property of the debtor vests in the trustee upon the approval of the bond, whether the conveyance has been made or not, but it would seem none the less the duty of the debtor to make the deed as required by this section. And, therefore, the same duty of making the conveyance, rests upon the debtor whether he or his creditors file the petition, and the views of this Court in 55 Md. in reference to the provision of the voluntary insolvent law then in force requiring a deed to vest title in the trustee, applies with equal force to a case of involuntary insolvency brought under the present Code.

But it does not seem to us reasonable to suppose that the Legislature could have intended by the present law to subject married women and *feme sole* traders to its provisions—otherwise clear and distinct language for that purpose would have been used. Such a radical change in the scope of the

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insolvent law as it is generally understood certainly would not have been, and should not be, left to mere inference and conjecture.

*Order affirmed.*

(Decided November 22nd, 1894.)

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PHILIP S. McLAUGHLIN, TRADING AS THE BALTIMORE  
TRANSFER COMPANY, vs. AUGUST C. MENCKE.

*Discrediting Witness.*

A witness may be asked on cross-examination, in order to impeach his credibility, whether he had ever been in jail, and why he had been sent there.

Where an exception is taken to a question asked of a witness on cross-examination to impeach his credibility, his testimony in chief should be set forth in the bill of exceptions, in order that the Appellate Court may determine whether the appellant was injured by the ruling of the trial Court.

Appeal from Baltimore City Court. This was an action by the appellee to recover damages for an injury alleged to have been caused by the negligence of the driver of defendant's wagon. The driver was offered as a witness by the defendant, and was asked on cross-examination whether he had been sent to jail under a charge or conviction, and for what offence. To the ruling of the Court (WRIGHT, J.), allowing these questions to be asked, the defendant excepted.

The cause was argued before BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.



*Leigh Bonsal* (with whom was *Edgar G. Miller, Jr.*, on the brief), for the appellant.

By the ruling of the Court below, irrelevant testimony was introduced which damaged the appellant's case before the jury, and the ruling was therefore erroneous. Irrelevant matters cannot be investigated on cross-examination for the purpose of discrediting the witness. 1 *Greenleaf on Evidence*, secs. 454, 455; *Goodhand v. Benton*, 6 G. & J. 484; *Kriete v. Meyer*, 61 Md. 569; *Lee v. Tinges*, 7 Md. 236; *Davis v. Calvert*, 5 G. & J. 304; *Sloan v. Edwards*, 61 Md. 105. So in *Shartzler v. State*, 63 Md. 150, on a trial for rape, it was held that the prosecutrix could not be asked whether she had previously had connection with a person other than the prisoner. The matter against witness must amount to an impeachment of character for truth. *Vernon v. Tucker*, 30 Md. 462. And therefore, in *Thomas v. Pile*, 3 H. & McH. 241, the fact that a female witness had kept company with negroes, was held irrelevant on the question of credibility. In *State v. Huff*, 11 Nevada, 19, (cited in §474, *Wharton on Criminal Evidence*), it was held that a witness could only be asked as to convictions that affect credit, and not as to one for assault and battery. So in §486 of *Wharton*: "It has been held inadmissible in order to attack veracity to prove the bad character of a female witness for chastity, or to show that she is a prostitute; or to prove habits of intemperance which do not affect the perceptive or narrative powers." *Thayer v. Boyle*, 30 Me. 475; *Hoitt v. Moulton*, 21 N. H. 586." In *Clement v. Brooks*, 13 N. H., the Court adopting the section of *Greenleaf* quoted above, excluded the question: Have you ever lived in the State's prison? In *Thayer v. Boyle*, 30 Me. 475, at page 481: "The evidence offered for the intemperate habits of one of the plaintiff's witnesses was properly excluded. Evidence of this kind has never been held competent here, where the impeachment of the character of a witness has been confined to his general reputation for truth." In *Hoitt v. Moulton*, 21 N. H. 586, at page 592: "In attempting to impeach the character of a

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Argument of Counsel.

witness for veracity, the inquiries must be confined solely to his general reputation for truth. \* \* \* Even the conviction of a crime is not admissible in evidence to impeach the credit of a witness." See also *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Com. v. Gallagher*, 126 Mass. 54; *Com. v. Mason*, 105 Mass. 163; *Pooler v. Curtis*, 3 N. Y. S. C. 228; *Farley v. State*, 57 Ind. 331; *Brown v. People*, 15 N. Y. S. C. 562; *Hanners v. McClelland*, 37 N. W. Rep. 389.

In some States there are statutes providing that the conviction of a witness of a crime may be shown to affect his credibility. *Pub. Stats. Mass.* Ch. 169, sec. 19; *Iowa Code*, sec. 4898; *N. Y. Penal Code*, 714; *Ibid*, *Code Civil Prac.* 832; *Code California*, sec. 2051. In Maryland there is no statute on the subject.

The best evidence of a fact should always be produced. Therefore it was improper to prove a conviction by parol. 1 *Greenleaf on Evi.*, sec. 457; *Wharton on Criminal Evi.*, secs. 153, 474; *Doggett v. Simms*, 79 Ga. 253; *State v. Prater*, 26 South Carolina, 198; *Smith v. State*, 64 Md. 25; *Kerschner v. State*, 9 Wis. 145; *Commonwealth v. Gallagher*, 126 Mass. 54; *Farley v. State*, 57 Indiana, 331.

*S. S. Field* (with whom was *Samuel Regester* on the brief), for the appellee.

If the witness in question gave no material evidence, and the record does not show that he did, then the defendant was not injured by the action of the Court in allowing him to be discredited by the questions objected to. *County Comr's v. Gantt*, 78 Md. But the Court did not err in allowing the questions to be asked. *Smith v. State*, 64 Md. 25; *Roddy v. Finnegan*, 43 Md. 490; *State v. Wentworth*, 65 Me. 234, 502; *Commonwealth v. Shaw*, 4 Cushing, 595; 1 *Greenleaf Evi.*, sec. 451; *Reg v. Kinglake*, 22 L. T. N. S. 335; *Cloyes v. Thayer*, 3 Hill, 504; *People v. Brown*, 72 N. Y. 573.

Subject to a wise discretion in the trial court, which will

not permit the raking up of transactions long buried, a party has a right to ask on cross-examination and to have answered, for the purpose of discrediting the witness, whether the witness has not been in jail, penitentiary, &c., and for what. *State v. Taylor*, 24 S. W. Rep. 449 (Mo. Nov. 1893); *State v. Miller*, 100 Mo. 606; *Wilbur v. Flood*, 16 Mich. 41; *Clemens v. Conrad*, 19 Mich. 171; *Chamberlayne's Best on Evi.* (ed. 1893) 602; *Wharton Crim. Evi.* sec. 474; 1 *Thompson Trials*, sec. 467; *State v. O'Brien*, 81 Iowa, 93.

FOWLER, J., delivered the opinion of the Court.

The record in this case is very unsatisfactory, and does not properly, if at all, present the question which was argued, inasmuch as it does not appear whether the appellant was injured by the ruling complained of. The only exception taken by him, so far as the record discloses, is to certain questions addressed during cross-examination to the witness Jacob Lutz. These questions were asked for the purpose of discrediting the witness, and in answer to them he admitted that he had been tried and sentenced by a magistrate within a month preceding to serve a short term in jail for drunkenness. The only evidence set forth in the bill of exceptions is contained in an extract from the cross-examination of the witness. What his testimony in chief was we are not informed, and it is impossible to say whether it was relevant and material or not. If not, the appellant was not injured by the ruling of the Court. For aught we can see the testimony in chief may have been of no value whatever to the appellant, and its entire exclusion may have been beneficial rather than injurious to him. In order to justify a reversal, as we have often said, there should be a concurrence of error on the part of the Court and injury thereby resulting to the appellant, and this must be apparent from the record.

As the case was fully argued, we will briefly consider the

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question which was intended to have been presented. We have seen there was no injury, and we think it is clear the Court below committed no error.

The appellant contends that by the ruling complained of irrelevant testimony was introduced on the cross-examination of his witness, which damaged his case before the jury; and that even if the appellee had the right to show the witness had been convicted of drunkenness in order to discredit him, it was error not to produce the best evidence thereof, namely, the record of conviction. We think, however, that the case of *Smith v. State*, 64 Md. 25, fully disposes of any doubt as to the relevancy of the evidence brought out on cross-examination, and the propriety of the question by which it was elicited. The question in the case just cited was "State if you have ever been confined in the Baltimore City Jail." And the question here was, "Have you ever been in jail," which was followed by the question, "What were you sent there for." In *Smith v. State*, *supra*, we held that the theory upon which such inquiry has been allowed is that the credibility of a witness is always in issue, and therefore anything which will tend to throw light upon his character in that regard may always be inquired into. And we cited *Real v. The People*, 42 N. Y. 270, quoting the following language of the Court of Appeals of New York: "A witness upon cross-examination may be asked whether he has been in jail, the penitentiary or the state prison, or any other place that would tend to impair his credibility." The object of the question here asked was the same as that in *Smith v. State*, namely, to impair the credibility of the witness, and the question having been ruled proper in that case, it is equally so here.

But it is contended that conceding (and this concession is necessary since the ruling in *Smith v. State*), that even if the appellee had the right to show the witness had been convicted, it was error not to produce the best evidence thereof, viz., the record of conviction. While there is some conflict in the authorities, text books as well as reported

cases, upon this subject, we think the more reasonable and practical rule is that which does not demand the production of the record when the object, as here, is solely for the purpose of discrediting. In commenting upon this question, Mr. Thompson in his work on *Trials*, section 467, says "There is a confusion in the authorities as to whether a witness may be asked on cross-examination, whether he has been arrested, indicted or convicted upon a criminal charge. One of the difficulties grows out of the question whether such a matter can be proved by *secondary evidence*—even by the admission of the witness, who must of all men be certain of the fact if it existed. The strain about secondary evidence in such a case is a mere quibble, destitute of common sense." In *Clemens v. Conrad*, 19 Mich. 174, COOLEY, C. J., clearly lays down the rule and the reasons on which it is based: "The right to inquire of a witness on cross-examination whether he has not been indicted and convicted of a criminal offence, we regard as settled in this State by the case of *Wallace & Flood*, 16 Mich. 90. It is true that in that case the question was whether the witness had been confined in the State prison, not whether he had been convicted; but confinement in prison presupposes a conviction by authority of law, and to justify the one inquiry and not the other would only be to uphold a technical rule, and at the same time point an easy mode of evading it without in the least obviating the reasons on which it rests. We think the reasons for requiring the record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed on the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent."

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To the same effect is also section 474 *Wharton's Criminal Evidence*. See also *State v. O'Brien*, 81 Iowa, 93; *St te v. Miller*, 100 Mo. 622, and *St te v. T ylor*, 24 S. W. Rep. In the case last cited the Supreme Court of Missouri say: "In this country there has, been some hesitation in permitting a question, the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting the witness, to require an answer."

*Judgment affirmed.*

(Decided November 22d, 1894.)

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ISABELLA RICHARDSON vs. ELIZA A. SMITH,  
ADMINISTRATRIX OF WILLIAM RICHARDSON.

*Issues from the Orphans' Court—Proof of Marriage.*

Issues sent from an Orphans' Court to a Court of law for trial ought to be framed with reference to the persons named and the matters set forth in the petition and answer.

Such issues should not be unnecessary reduplications of the same matter.

Where the petition asked for the issue: Whether Isabella Richardson is the widow of William Richardson; it is error in the Orphans' Court to frame issues presenting the questions whether William Richardson was the husband of Isabella Parsons, and if yea, when, where and how was their marriage celebrated.

In this State there cannot be a valid marriage without a religious ceremony; but marriage may be proved by general reputation, cohabitation and acknowledgment, and when these exist it will be inferred that a religious ceremony has taken place, although evidence may not be obtained of the time, place and manner of the celebration.

Appeal from the Orphans' Court of Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Charles E. Hill*, (with whom was *Frederick P. Ross*, on the brief), for the appellant.

The issues set forth in the order are improper ; they contain irrelevant matters and are misleading and inconclusive. The order of the Court makes *Isabella Richardson*, plaintiff ; the question presented by each of the three issues, is as to the relation of William Richardson with one *Isabella Parsons*. Who is *Isabella Parsons*? Outside of this order, the name does not appear in the record. No testimony or evidence has been taken in these proceedings, no such person has been before the Court, and as far as these proceedings are concerned, there is no such person. Should these issues be transmitted as ordered and determined by a jury in the affirmative or in the negative, it would not conclude the claim of *Isabella Richardson* set up in her petition. If the name of the petitioner was inserted instead of the name *Isabella Parsons*, the issues would still be objectionable. The first issue seems to be an attempt to incorporate in a question, a legal definition of one of the elements necessary to constitute a woman, a widow. It is not the province of the Orphans' Court in framing issues to give legal definitions. *Sumwalt v. Sumwalt*, 52 Md. 347. If there was a legal marriage, it makes no difference "when, where or how" it was celebrated and such inquiry tends to mislead a jury. Marriage may be proven from cohabitation, general reputation and acknowledgment. *Sellman v. Bowen* 8 G. & J. 50 ; *Crauford v. Blackburn*, 17 Md. 49.

*W. Hall Harris* and *William Colton* (with whom was *George R. Willis* on the brief), for the appellee.

That it was within the power of the Orphans' Court to exercise its judgment in determining what facts were in issue between the parties, and material to be submitted to a

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jury for decision, had been law in this State long before its definite announcement by this Court in *Munnickhuysen v. Magraw*, 35 Md. 280; *Williamson v. Montgomery*, 40 Md. 378. It is contended that if the issues substantially submit the real question, making it at once sufficiently comprehensive fully to inform the jury, and not unnecessarily technical or multifarious, such issues will be approved upon appeal. If the issues as framed present every material fact necessary to be determined, this Court will affirm the order, transmitting them for trial. *Williamson vs. Montgomery*, 40 Md. 373, 379.

That this Court will not reverse the Orphans' Court upon the grant of issues to the Court of Law merely because of a multiplication of issues or of an unsystematic arrangement of them, was specifically determined in the case of *Worthington v. Ridgely et al.*, 52 Md. 349, 354, 356, where the issues granted were confessedly multiplied beyond any necessity, and so numerous and ill-arranged as certainly to create serious confusion before the jury; yet, inasmuch as this Court found them substantially to present the facts really at issue, it affirmed the action of the Orphans' Court and indicated the manner in which the apparent confusion might be remedied. The case at bar is, in its worst aspect, simple in comparison to this, and can but require that instruction to the jury which "the able Court before which the case will be tried will" see is afforded. (Page 356.)

This Court will never reverse the rulings of a Court of Law where the appellant has suffered no injury, and where his case has been as favorably presented as he was entitled to have it, whether such rulings be technically correct in law or not. *Cooper v. Utterbach*, 37 Md. 282, 319; *Rapp v. Berger & Dittman*, 60 Md. 1, 14; *Keener v. Harrod & Brooke*, 2 Md. 63, 74; *Johns v. Caldwell*, 60 Md. 259.

Parties asking a removal of an order of the Orphans' Court, must appear to have a standing in Court, and to have been injured by the order appealed from, and they must show this, or the appeal will be dismissed. *Hinkley, Testa-*



*mentary Law*, sec. 1773 ; *Hoffar v. Stonestreet*, 6 Md. 303 ; *Cecil v. Cecil*, 19 Md. 78. If the appellant is prepared to prove the allegations of her petition, she must be equally prepared to furnish the proof necessary to support the issues as granted.

BRYAN J., delivered the opinion of the Court.

Isabella Richardson, by her petition in the Orphans' Court of Baltimore County, alleged that she is the widow of William Richardson, who died intestate, and, that without notice to her, letters of administration on his estate have been granted to his sister, Eliza A. Smith. The petitioner prays that the letters may be revoked, and that she may have general relief. Eliza A. Smith answered the petition and denied that the petitioner was the widow, and that she was ever the wife of the deceased. The petitioner prayed an issue in the following terms: "Whether the petitioner, Isabella Richardson, is the widow of William Richardson, deceased." The Orphans' Court refused to grant the issue proposed in behalf of the petitioner and ordered the three following:

*1st Issue*.—"Was William Richardson, late of Baltimore County, deceased, married to Isabella Parsons; and if yea, when, where, and how was said marriage celebrated?"

*2nd Issue*.—"Was William Richardson the husband of said Isabella Parsons at the time of his death, to-wit, December 10th, 1893?"

*3rd Issue*.—"Was Isabella Parsons the wife of William Richardson at the time of his death, to-wit, December 10th, 1893?"

The issue prayed on the part of the petitioner was a clear statement of the question in controversy. There is no reason why it should not have been granted. The issues which were granted present an inquiry about the marriage of Isabella Parsons, when no person bearing that name is mentioned in the pleadings. It may be surmised that the petitioner is the person who is meant; but nevertheless, the issues ought to be framed concerning the persons named

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and the matters set forth in the petition and answer. Supposing that these issues relate to Isabella Richardson, the second and third are in effect the same, and are merely repetitions of the issue proposed by the petitioner. And the third presents the question of marriage between the parties, and also the additional inquiry when, where, and how it was celebrated. In this State there cannot be a valid marriage without a religious ceremony, but a marriage may be competently proved without the testimony of witnesses who were present at the ceremony. It would work very cruel injustice in many instances, if the law were otherwise. The witnesses might be dead, and competent written evidence of the ceremony might be unattainable. It would not follow, however, that the union between the parties would be considered illicit and the children illegitimate. The law has wisely provided that marriage may be proved by general reputation, cohabitation and acknowledgement; when these exist, it will be inferred that a religious ceremony has taken place; and this proof will not be invalidated because evidence cannot be obtained of the time, place and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from *Redgrave v. Redgrave*, 38 Maryland, page 97: "Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. 1 *Taylor's Ev.*, sec. 140, 517; *Hervey v. Hervey*, 2 W. Bl. 877; *Goodman v. Goodman*, 28 L. J. Ch. 1; *Jewell v. Jewell*, 1 How. U. S. 219, 232. Indeed the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation and acknowledgment. *Sellman v. Bowen*, 8 Gill & John. 50; *Boone v. Purnell*, 28 Md. 607."

The issue prayed by the petitioner presented the question

with great simplicity, while the issues granted by the Orphans' Court were unnecessary reduplications of the same matter. This Court has said (*Sumwalt v. Sumwalt*, 52 Md. 348): "In our opinion, the correct rule to be observed, and the one which will best subserve the purposes of justice, is to grant no more than one issue presenting the same substantial question; and secondly, not to multiply the issues unnecessarily, and to grant such only as distinctly present the real questions in dispute." For error in refusing the issue prayed by the petitioner, and in granting the other three, the order of the Orphans' Court must be reversed, and the case remanded for further proceedings in accordance with this opinion.

*Reversed and remanded.*

(Decided November 22d, 1894.)

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CAROLINE RICHARDSON vs. ELIZA A. SMITH,  
ADMINISTRATRIX OF SAMUEL RICHARDSON.

*Issues from the Orphans' Court—Legitimacy.*

A petition in the Orphans' Court asked for the issue: Whether the petitioner, Carrie Richardson, is the sister of Samuel Richardson, deceased. The issues as granted were: (1.) Is Caroline Richardson, otherwise called Caroline Parsons, the daughter born in wedlock of William Richardson and Isabella Parsons; and if yea, when and where was the said Caroline born? (2.) Is Caroline Richardson, otherwise called Caroline Parsons, the daughter born out of wedlock of William Richardson and Isabella Parsons; and if yea, did the said William and Isabella, after the birth of Caroline, intermarry, and did the said William, after said marriage, if any, acknowledge the said Caroline to be his child by the said Isabella? *Held*, that these issues were improperly framed, and that the issue asked for in the petition should have been granted.

Appeal from the Orphans' Court of Baltimore County.

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Opinion of the Court.

The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Charles E. Hill*, (with whom was *Frederick P. Ross*, on the brief), for the appellant.

*William Colton* and *W. Hall Harris* (with whom was *George R. Willis*, on the brief), for the appellee.

BRYAN, J., delivered the opinion of the Court.

This appeal is taken from an order of the Orphans' Court of Baltimore County, which refused to grant an issue prayed on the part of the appellant, and instead thereof granted two others prayed on the part of the appellees. Caroline or Carrie Richardson filed a petition containing the following statement: "That she is a sister of Samuel Richardson, late of Baltimore County, deceased, who died unmarried and intestate, leaving no father, mother, brother, nor any other sister him surviving; and that she is entitled to letters of administration upon his estate in preference to any other person; but without notice to your petitioner application has been made and letters of administration granted by this Honorable Court to Eliza A. Smith, an aunt of the deceased." The petition prayed a revocation of the letters of administration and general relief. Eliza Smith answered the petition and admitted the grant of letters to her, and that she was an aunt of the decedent. She denied the petitioner's right to letters, and averred that she was fully aware of the application for them and the grant of them to the respondent. She also made this statement in her answer: "That she admits the death, intestate, of said decedent, and that he left him surviving neither parent, brother or sister, or descendant, but she denies that there ever was any other offspring than said decedent of any marriage of his father, William Richardson, late of said Baltimore County, deceased, or of any marriage of his mother, Lucy Richardson, also late of said county,

deceased." This is an argumentative denial that the petitioner is a sister of the decedent. Of course, in considering this traverse we have no reference to the exceptional cases of the rights conferred on illegitimate children by the one hundred and thirty-fourth section of Article ninety-three of the Code. There is no averment of illegitimacy either in the petition or answer, and it would be irrelevant to consider it. It is not questioned by either party that it was proper to determine by appropriate proceedings the petitioner's claim of relationship to the decedent, before considering the question whether there had been a forfeiture of the right of administration. The propriety of such a course is established by *Reilly v. Dougherty*, 60 Md. 276. The appellant asked the Court to send this issue to a jury, to wit: "Whether the petitioner, Carrie Richardson, is the sister of Samuel Richardson, deceased." This was the point of controversy between the parties. It was the matter affirmed on one side and denied on the other. The question was presented clearly, distinctly, perspicuously and accurately. The form in which it was expressed agrees with Lord Coke's definition of an issue, which he declares to be "a single certain and material point issuing out of the allegations of the plaintiff and defendant." We think that this issue ought to have been granted been granted by the Orphans' Court. They, however, refused it and granted two others.

The first one is as follows: "Is Caroline Richardson, otherwise called Caroline Parsons, the daughter, born in wedlock, of William Richardson, late of Baltimore County, deceased, and Isabella Parsons; and if yea, when and where was the said Caroline born?" By this issue the jury are required to find whether the petitioner is the legitimate daughter of Isabella Parsons. Neither the petition nor the answer makes any reference to Isabella Parsons; she is not in any way mentioned. It seems to have been the principal object of the issue to present the question whether the petitioner was the legitimate daughter of Wm. Richardson,

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who is stated in the answer to have been the father of the decedent ; but it improperly connects with this question an inquiry about Isabella Parsons, concerning whom the pleadings are silent. It also contains an irrelevant inquiry about the time and place of the birth of the petitioner. In many instances it is impossible to establish these facts by competent testimony, although the legitimacy may be fully proved. The birth may have taken place in a foreign country and at a remote period, and all evidence of time and place may have been lost, or may be inaccessible ; while the evidence of the legitimacy may be amply sufficient. For instance, where parents living together as husband and wife, and so declaring themselves and generally reputed so to be, have brought up a child as their legitimate offspring and have always acknowledged him as such, their declarations would be competent evidence after their death to prove his legitimacy, and it would not be necessary to prove the time and place of his birth. The second issue granted by the Orphans' Court is as follows: "Is Caroline Richardson, otherwise called Caroline Parsons, the daughter, born out of wedlock, of William Richardson, late of Baltimore County, deceased, and Isabella Parsons ; and if yea, did the said William Richardson and the said Isabella Parsons, after the birth of the said Caroline, intermarry, and did the said William, after the said marriage, if any, acknowledge the said Caroline to be his child by the said Isabella ?" This issue presents the question whether the petitioner was the illegitimate daughter of Isabella Parsons and William Richardson, and whether she was afterwards legitimated. The objections to the first issue apply to this one. Both of them are comprehended in the issue proposed in behalf of the petitioner. That required the jury to find whether the petitioner was the sister of the decedent, that is to say, his legitimate sister. It made no difference whether she was sister of the whole or the half blood. Art. 93, section 24 of the Code. If it should appear in evidence that the petitioner was born out of wedlock, it would be necessary for her to prove the

subsequent intermarriage of her parents, and her acknowledgement by her father as his child. This intermarriage and acknowledgment would establish her legitimacy. Art. 46, section 29 of the Code. The Court before which the issue is to be tried will, of course, give the jury the proper instructions to enable them to find a verdict intelligently.

There was error in refusing the issue proposed by the petitioner, and also in granting the other two. The order of the Orphans' Court must be reversed, and the case remanded for further proceedings in accordance with this opinion.

*Reversed and Remanded.*

(Decided November 22, 1894.)

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WILLIAM BURK AND LOUIS BURK, PARTNERS,  
ETC., *vs.* S. L. TINSLEY.

*Attachment—Voucher.*

A voucher or account in an attachment against a non-resident, simply stating an indebtedness of the defendant, without showing on what account, whether for goods sold, money borrowed, or otherwise, is insufficient.

Appeal from the Superior Court of Baltimore City.

This was an attachment against a non-resident, upon the account set forth in the opinion of the Court. After a confession of assets in the hands of the garnishee, and a judgment of condemnation, certain claimants of the credits attached moved to strike out the judgment (at the same term of Court); and the defendant moved to strike out the judgment and quash to the attachment. From the order of the Court (RITCHIE, J.), granting the motion of the defendant on the ground of the insufficiency of the voucher, the plaintiff appealed.

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The cause was argued before BRYAN, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*Samuel J. Harman* (with whom was *Augustus Paper* on the brief), for the appellants, cited *Stewart v. Katz*, 30 Md. 334; *Cox v. Waters*, 34 Md. 460; *Bartlett v. Wilbur*, 53 Md. 601; *DeBebian v. Gola*, 64 Md. 262.

*S. S. Field*, for the appellee, relied upon the following cases to show the insufficiency of the voucher: *Cox v. Waters*, 34 Md. 461; *Hoffman v. Reed*, 57 Md. 370; *Thillman v. Shadrick*, 69 Md. 528; *Mears v. Adreon*, 31 Md. 229; *Dean v. Oppenheimer*, 25 Md. 368; 2 *Poe's Pl. and Prac.* secs. 513, 516.

PAGE, J., delivered the opinion of the Court.

This appeal is from the order of the Court below, striking out the judgment of condemnation and quashing the attachment. The order of the Court is, "that the judgment of condemnation in this case be and it is hereby stricken out, and the writ of attachment be and hereby is quashed, on the ground of the insufficiency of the voucher, provided the defendant enters his appearance to the short note case." The voucher, thus declared by the Court to be insufficient, is as follows:

PHILADELPHIA, Oct. 17th, 1892.

S. L. TINSLEY,

Dr.

WM. BURK & BRO.

Dr.

Oct. 12. Cash..... 1,978 50

Cr.

29,000 lbs. gross wght. hogs.

80%

23,200 at 7½..... 1,682 00

Less freight..... 124 00 1,558 00

\$420 50

With interest from Oct. 17th, 1892.



Now, while the voucher or evidence of debt is not required to be produced *qua* testimony, yet it ought to show the real nature and extent of the claim as set forth in the affidavit. *Hoffman, etc., v. Reed*, 57 Md. 375.

In that case, an account "To professional services, as per agreement \$200," was held insufficient, because "it does not give to the debtor or other persons interested any certain notice or information as to the real nature and character of the claim." So in *Thillman v. Shadrick*, 69 Md. 529, where the voucher was "To a balance due on purchase money of nine houses," etc., the Court said: "The correctness of the balance depends upon the accuracy of the debits and credits. It is impossible for the defendant to state, as his defence, what part of the plaintiff's claim is admitted and what denied, where no information as to the particulars of the indebtedness is given; and as it was the object of the Act of Assembly to narrow the questions in issue between the parties as much as could practicably be done, it seems clear upon principle, that such a statement as that filed by the appellee, is very far from being what the statute exacts." In *Stewart v. Katz*, 30 Md. 346, the account was declared sufficient because "it was certain in its items and details," and "is made out in the mode usually adopted by merchants engaged in extensive business, and is perfectly intelligible."

In *Cox v. Waters*, 34 Md. 461, the account: "To cash loaned at sundry times on call," was held sufficient, because it gave the debtor the real nature and character of the claim. In that case, a distinction is made between "an account for goods bargained and sold at sundry times," which would not be sufficient, and the one they then had under consideration. The former embraces elements of quantity and prices, and unless these were set out, no information as to the real nature of the claim could be given; but the case of "cash loaned" is more simple, and if the aggregate is stated, dates and quantities of the several sums loaned are not essential to make the matter perfectly intelligible.

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In *Bartlett v. Robins*, 53 Md. 501, "each of the items is set forth, the building for which they were furnished is specifically referred to, and the time during which the appellee was employed in doing and in superintending the work is stated."

From this brief review of the principal cases in Maryland on this subject, the rule to be applied here is, does the account filed in this case, furnish such certain information as to make clear to the defendant what is the real nature and character of the claim? The item charged is "cash." Now, if the account was for "cash loaned," it would have been clear that the suit was to recover for money, which the plaintiff had loaned the defendant. But the claim as it stands means simply, that the defendant owes the plaintiff \$1,978.50 (the dollar mark, when the whole account is examined, may be supplied); but on what account, whether for goods sold or money loaned or otherwise, the account entirely fails to show. It therefore leaves the defendant entirely uninformed as to the "real nature and character" of the plaintiff's claim, and is wholly insufficient to support the attachment.

Other reasons for quashing the attachment were argued in the briefs of counsel; but, inasmuch as what we have said disposes of the case we will not consider them.

*Order affirmed.*

(Decided November 22d, 1894.)

THE MARYLAND LAND AND PERMANENT  
HOMESTEAD ASSOCIATION OF BALTIMORE  
COUNTY *vs.* BENJAMIN P. MOORE, TRUSTEE,  
ELIZABETH R. HOPKINS AND GERARD T.  
HOPKINS.

*Vendor's Lien—Trustee—Bona fide Purchaser—Notice.*

A trustee made an absolute conveyance of part of the trust property by a deed reciting the full payment of the purchase money when only a part of the same was in fact paid. The vendee conveyed the property to the defendant corporation which paid the consideration. Upon a bill filed by a substituted trustee to enforce a vendor's lien against the defendant, *Held*, that although the trustee was guilty of a breach of trust in making such conveyance, yet the defendant was not liable, unless it had notice when the property was bought, that part of the purchase money was still owing from its vendor to the Trustee.

Upon the facts of this case, it was *held* that neither the defendant nor its attorney had notice that part of the purchase money of the land was due from its vendor to the trustee, and that the defendant was consequently a *bona fide* purchaser without notice of the breach of trust.

Appeal from the Circuit Court for Baltimore County. The case is stated in the opinion of the Court. The bill in this case was filed by the appellees to enforce a vendor's lien, and alleged that at the time of the conveyance of the trust property by the trustee to the party under whom the appellant claims, only a part of the purchase money was actually paid to the trustee; and that the appellant, then having knowledge of this fact and of the trust, was bound in equity for the deficiency. The Court below (BURKE, J.) held that the appellant did have such knowledge, and decreed the payment to the appellee of the sum of \$7,975, with interest from August 19, 1874.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

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Argument of Counsel.

*Edgar H. Gans* (with whom was *B. H. Haman*, on the brief), for the appellant.

The Court below seemed to treat the question as simply one of notice, and found from the facts surrounding the transaction that the appellant did have notice of the non-payment of the purchase money by the Woodberry Land Company to Gerard H. Reese, trustee. The appellee claims that only \$12,950 of the \$20,925 was paid by the Woodberry Land Company to the trustee, and of the non-payment of the balance the appellant had notice when it purchased from the Woodberry Land Company. We think, however, that there are other questions of law in the case besides the question of notice. The appellant will maintain : (1.) That whatever vendor's lien existed was waived and lost by the action of the trustee ; and (2), that it was a *bond fide* purchaser, without notice.

We are dealing with two transactions, the sale by Reese, trustee, to the Woodberry Land Co , and the sale by this latter company of the same tract of land. In both of these transactions F. L. Morling acted for the Woodberry Co. When that company bought from Reese, trustee, the purchase price was \$20,925. Morling, in dealing with Reese, evidently told him of the sale to the appellant, and that there would be \$14,000 in notes of the appellant. Reese was willing to take these notes, provided Morling could get them discounted. Morling, therefore, made an arrangement with Wm. J. Hooper, who had the funds of Mrs. Phillips to invest, to have her discount the notes. Accordingly, Reese, trustee, received these \$14,000 of notes in part payment, with the understanding that they were to be discounted ; he gave Morling a credit of \$900 in cash, for commissions he owed him on a former transaction, and for the balance, \$7,000, Reese took the four single bills of the Woodberry Land Company. Subsequently, to-wit, August 28, 1874, Wm. J. Hooper, acting as agent for Mrs. Phillips, discounted these \$14,000 of notes for Reese, in accordance

with the understanding with Morling, by giving his check for \$12,950.

The Court below decided that this was the only payment made by the Woodberry Land Company, and that consequently, the difference between the \$20,925 and the \$12,950, or \$7,975, was still due, and of the fact of the non-payment of this balance, the appellant had notice, and consequently, the vendor's lien could be enforced. There is no evidence in the record from which it can be found that the appellant had notice of the non-payment of this balance. The arrangement between Morling and Hooper, for the discount of the \$14,000 of notes, might indeed have been evidence that on the day of the transfer of the property to the appellant, it had notice that this amount had not been paid to the trustee, but there is nothing in any part of the testimony to show that Hooper or any other person, whose knowledge would affect the appellant, had notice that the balance was to be adjusted by paying Morling some \$900 of old debt, and by taking promissory notes or single bills for \$7,000. See *Gemmel v. Davis*, 75 Md. 553; *Winchester's case*, 4 Md. 231. This point cannot be very well discussed unless the evidence upon which the appellee relies is pointed out in his brief. It is like proving a negative.

Each of these single bills was assigned by Reese, trustee, and the money procured on them by him used in the business of which he was senior partner. It is practically the same thing as if he had been paid cash by the Woodberry Company and had stolen the cash from his trust fund for the use of his firm. The argument we formulate as follows:

1. These are single bills: *Gist v. Drakely*, 2 Gill, 333; *Trasher v. Everhardt*, 3 G. & J. 234; *Jackson v. Myers*, 43 Md. 453; *Hamburger v. Müller*, 48 Md. 323. 2. The doctrine is well-settled in this State that a trustee cannot enforce a vendor's lien when the bond securing the payment of the purchase money has been assigned, whether the assignment was made with or without the sanction of

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the Court, when the trust estate cannot be made liable to the assignee. In such cases, as to the trustee, it is regarded a payment

The case of *Hayden v. Stewart*, 4 Md. Ch. 280, is exactly the case at bar. See also *Dixon v. Dixon*, 1 Md. Ch. 221; *Schnebly v. Ragan*, 7 G. & J. 125-6; *Iglehart v. Armiger*, 1 Bl. 521; *White v. Williams*, 1 Paige, 502; *Sugden on Vendors*, chapter 19, page 398, note *d*; *Macreath v. Symmons*, *Leading Cases in Equity*, Vol. 1, pt. 1, 493. 3. The trustee or the trust estate could not be liable to the Union Bank. *Third Nat. Bank v. Lange*, 51 Md. 138.

The conclusion is that the trustee actually received the money and cannot be made to pay it back.

The only remaining question of liability is as to whether the purchaser is bound to see to the application of the purchase money. In these classes of cases the purchaser is never obliged to see to the application of the purchase money. *Van Bokkelen v. Tinges*, 58 Md. 57; *Keistere v. Scott*, 61 Md. 507; *Perry on Trusts*, sections 791-800.

*Arthur W. Machen*, for the appellees.

That the Maryland Land and Permanent Homestead Association was fully apprised of all the facts, had notice of the trust from the land records and Court proceedings, had knowledge that only the \$12,950 of cash was paid to the trust estate, and knew that the property conveyed by the trustee's deed was equitably charged with the obligation for the payment of the balance of the \$20,925, is abundantly shown. L. P. D. Newman, its solicitor and agent, was privy to the whole transaction. He had been Sanford's counsel from the beginning, in connection with the purchase from the trustee. None knew better than he the limitations of the trust, and the want of power of the trustee to convey title without payment of the full consideration of \$1,500 per acre. The two deeds, the one from the trustee to the Woodberry Land Company, and the other from the Woodberry Land Company to the Maryland Land and Perma-

nent Homestead Association, were parts of one conveyance, delivered and recorded together. The deeds were dated, one on the 19th of August, 1874, and the other on the 20th of August, 1874, the certificates of the Clerk of the Superior Court to the official character of the justice, are both dated on the 21st day of August, and on the 22d day of August, 1874, both deeds were together deposited for record. All parties knew perfectly well that the Woodberry Land Company had no money to pay the trustee with except as provision was made in the transaction itself. Therefore, there was the understanding, above referred to, that Mr. Wm. J. Hooper, the president of the Maryland Land and Permanent Homestead Association, and also agent of Mrs. Amanda M. Phillips, would discount \$14,000 of notes of that corporation, the proceeds to be paid to Mr. Reese, the trustee.

A purchaser under such circumstances, taking with notice of the trust, takes subject to the trust. *Abell v. Brown, Trustee*, 55 Md. 217; *Ins. Co. v. Eldridge*, 102 U. S. 545; *Oliver v. Piatt*, 3 How. 333.

ROBINSON, C. J., delivered the opinion of the Court.

The question raised on this appeal is whether the appellees are entitled to a vendor's lien on a lot of ground containing thirteen acres, which was sold and conveyed by the Woodberry Land Company to the Maryland Land and Permanent Homestead Association of Baltimore County, the appellant corporation?

The undisputed facts are these: On the 9th of April, 1842, John Clark and wife conveyed to John Roberts a tract of 107 acres of land adjoining the village of Woodberry, in trust for Thomas R. Mathews and Ann, his wife; the trusts being fully set forth in the deed. Upon the death of Roberts, Gerard H. Reese was appointed trustee in his place; and in the exercise of the power contained in the deed of trust, Reese, trustee, on the 1st July, 1873, sold the entire tract of 107 acres to Elias B. Sanford for the sum of \$104,312.50, of which \$5,000 was paid in cash, and for

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the balance of the purchase money Sanford gave six promissory notes to the trustee.

By bond of conveyance duly executed and recorded, Reese, trustee, agreed that upon the payment by Sanford to said trustee of the sum of \$1,500 for each and every acre sold by Sanford, lying south of a certain line drawn across the tract, and of the sum of \$1,250 for each and every acre so sold by him, lying north of said line, he, Reese, trustee, would execute to him or to whomsoever he might designate, a deed in fee simple for so much of the land as had been paid for in accordance with terms of the bond of conveyance.

On the 6th December, 1873, Sanford sold and conveyed the entire tract of 107 acres to the Woodberry Land Company of Baltimore City, a corporation of which he was president, for the sum of two hundred thousand dollars, the said sale being subject to all the provisions, agreements and covenants contained in the bond of conveyance from Reese, trustee, to Sanford.

On the 19th August, 1874, Reese, trustee, conveyed to the Woodberry Land Company thirteen acres, part of the 107 acres; and the deed, after reciting the provisions of the bond of conveyance, declares that "the parties of the third part have paid to the parties of the first and second parts the sum of \$20,925 for the land hereinafter described, the receipt whereof the parties of the first and second parts do hereby acknowledge." Here then is an absolute conveyance by Reese, trustee, to the Woodberry Company of the thirteen acres, and a declaration in the deed by him that the entire purchase money had been paid according to the terms of the bond of conveyance. Having the legal title, the Woodberry Company sold the property to the appellant for \$27,900, and the purchase money having been paid, that company, on the 21st August, 1874, conveyed the thirteen acres to the appellant.

It now appears, however, that although Reese, the trustee, conveyed the property to the Woodberry Company,



and in the deed declared that the entire purchase money, \$20,925, had been paid, that company paid in fact but \$12,950, and gave its promissory notes for \$7,975, being the balance of the purchase money, payable to the order of G. H. Reese, trustee.

These notes were subsequently discounted by Reese, trustee, at the National Union Bank, for account of the firm of G. H. Reese & Co., a commercial house of which he was a member, and not being paid at maturity, they have been renewed from time to time and are still unpaid. In the meantime Reese, the trustee, has died, and the firm of G. H. Reese & Co. has failed, and the Woodberry Company, it is said, is insolvent.

This is a bill filed by Benjamin P. Moore, trustee appointed in the place of Reese, to enforce a vendors' lien for the \$7,975, unpaid purchase money due by the Woodberry Company as against the appellant, to whom that company has sold and conveyed the property.

Now, upon these facts there cannot be any difficulty as to the principles of law by which this claim to the lien is governed. Reese, the trustee, had, it is admitted, full power under the deed of trust to sell the property, and upon the payment of the purchase money to convey the title to the purchaser. The conveyance by him of the legal title to the Woodberry Company before the payment of the entire purchase money was beyond question a breach of trust, and it is equally clear that as against that company the lien might have been enforced for the payment of the balance of the purchase money due by it to Reese, trustee. But in the meantime that company has sold the property and the entire purchase money has been paid and the title conveyed to the appellant. There is no ground, therefore, on which a vendor's lien can be enforced against the appellant, unless it had notice when it bought and paid for the property, that part of the purchase money was due and owing by the Woodberry Company to Reese, trustee.

And the question, and only question, is whether the

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appellant is a purchaser with such notice. The record is a large one, filled with matter that has little or nothing to do with the case, and when the learned counsel was asked during the argument to point out the testimony on which he relied to prove notice, the answer was that the record was full of it, but that he had not the time to refer to it in detail. Now we have examined it with a good deal of care, and have been unable to find any proof from which it can be fairly and reasonably inferred that the appellant had notice, actual or constructive, that any part of the purchase money was unpaid. The bill to enforce this lien was not filed till 1886, more than *twelve years after the sale by Reese to the Woodberry Company*, and no testimony was taken till two years after the bill had been filed. We are not surprised, therefore, that some of the witnesses should have so imperfect recollection in regard to the facts and circumstances connected with a sale of property which took place fourteen years ago. Mr. Hooper, the president of the appellant corporation at the time of the purchase of the thirteen acres from the Woodberry Company, says he is unable to testify from his own recollection in regard to the sale and purchase of the property. He finds, however, by referring to the minutes of the appellant, of the sale of 21st September, 1874, that he was one of the committee that reported that the property had been purchased from the Woodberry Company, and produced at the same time a deed from that company to the appellant. He also finds that promissory notes to the amount of \$14,000, being part of the purchase money due by the appellant to the Woodberry Company, were signed by him as president; and that these notes were discounted by him as the agent for his aunt, Mrs. Phillips, and the proceeds, \$12,950, were paid to Reese on account of purchase money due him as trustee by the Woodberry Company. He denies, however, having any knowledge that there was a balance of the purchase money still due by the Woodberry Company, on account of its purchase of the property. On the contrary, he says that neither he himself

nor the Board of Directors had any knowledge whatever in regard to the transactions between Reese, trustee, and the Woodberry Company. And after a long and searching examination he closes his testimony by saying: "I had no idea, and no knowledge whatever, but what the property purchased by us from the Woodberry Land Company was perfectly straight, and as far as that Company and the party from whom it purchased, it was all correct, and if there was anything wrong about it, I, as a member of that company, knew nothing."

They had requested Mr. Newman, their solicitor, to examine the title of the Woodberry Company and his report was accepted as being entirely satisfactory. It is quite unnecessary to consider the testimony of Mr. Numsen, for he does not recollect anything about the particulars of the sale, though he was at that time one of the members of the Board of Directors.

In fact, Mr. Morling, who was the secretary of the Woodberry Company, and who negotiated the sale with the appellant, is the only witness who seems to have a recollection in regard to the matters connected with the sale and purchase by the appellant. He says the arrangement made with the Woodberry Company was that the appellant was to buy the thirteen acres at \$2,000 an acre, \$900 to be paid in cash, eight houses on Stockton alley and one house on Tenant street, and for the balance of the purchase money, amounting to about \$14,000, the appellant was to give its promissory notes payable to the order of the Woodberry Company, and these notes were to be discounted by Mrs. Phillips. These notes were discounted, and the net proceeds, \$12,950, were paid by the Woodberry Company to Reese, trustee, and for the balance of the purchase money that Company gave its promissory notes amounting to about \$7,000, and these notes were discounted by the National Union Bank. Thereupon, as the proof shows, Reese, trustee, conveyed the property to the Woodberry Company by deed dated 19th August, 1874; and two days afterwards

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that Company conveyed the same property to the appellant. The fact, however, that the Woodberry Company had given to Reese, trustee, its promissory notes for the \$7,000 balance of purchase money was never, to his knowledge, he says, communicated to the appellant. And nowhere in this record do we find any proof to satisfy us that the appellant had notice, actual or constructive, that part of the purchase money of the thirteen-acre lot was unpaid. On the contrary, we think it may be fairly said that they bought this property under the belief that the Woodberry Company had paid the entire purchase money and had a good fee simple title to it. There is proof to show that Mr. Newman, the appellant's solicitor, knew that the Woodberry Company had given its promissory notes for \$7,975, payable to the order of Reese, trustee, being the balance of the purchase money due to him, but Mr. Newman is dead, and there is no proof from which it can be inferred that this fact was made known by him to the appellant.

So dealing with this case upon the proof before us, the appellant must, it seems to us, be treated as a *bona fide* purchaser without notice of the unpaid purchase money due by the Woodberry Company to Reese, trustee. And such being the case, there is no ground on which the appellee can claim a vendor's lien as against the appellant.

*Decree reversed and bill dismissed.*

(Decided November 22nd, 1894.)

A motion for a re-argument was subsequently made by the appellees, and in disposing of this motion,

ROBINSON, C. J., delivered the opinion of the Court.

In the motion for re-argument in this case, the counsel for the appellee says: "It is plain, therefore, that the decision rests on the ground of the interval between the two conveyances, from the trustee to the Woodberry Land Company, and from the latter to the appellant." In this the counsel is mistaken. We rested the decision on the ground that the Maryland Land and Permanent Homestead Asso-

ciation, the appellant, was a *bona fide* purchaser of the land in question from the Woodberry Land Company, holding the title under a deed from Reese, trustee, in which he acknowledged that the entire purchase money had been paid and that there was no sufficient proof to show that the Maryland Land and Permanent Homestead Association had notice that part of the purchase money was in fact unpaid and due by the Woodberry Company to Reese, trustee.

We further said there was proof to show that Mr. Newman, the appellant's solicitor, had such knowledge, but that Mr. Newman was dead and it did not appear that such knowledge was made known to the appellant. We did not mean to decide, as a matter of fact, that Newman himself had such knowledge, but merely that there was proof tending to prove knowledge on his part. Much less did we mean to say that such knowledge, if any he had, was acquired by him while he was acting as attorney for the appellant in regard to the sale and purchase of the property out of which this controversy has arisen. We agree with the counsel for the appellee that if Mr. Newman acquired the information, or had notice that part of the purchase money was unpaid, and such information was acquired by him while acting as attorney for the appellant in regard to the transaction, such information would be notice to the appellant, and for the reason that that, so far as it relates to the same transaction, the attorney represents his client, and knowledge on the part of the former will be imputed to the latter.

Upon the motion for re-argument we have carefully examined the testimony in the record on this point and have failed to find any proof which satisfactorily establishes the fact that Newman had notice that part of the purchase money was unpaid by the Woodberry Company. Now, what is the proof? It shows that the negotiations in regard to the sale and purchase of the property between the Woodberry Company and the Maryland Land and Permanent Homestead Association were conducted by Mr. Frank Morling, representing the Woodberry Company, and Messrs.

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Hooper, Hammond and Newman, representing the Homestead Association. It shows that the Woodberry Company sold to the Association the property against which the vendor's lien is now claimed, and that the entire purchase money was paid by the Association to the Woodberry Company, and thereupon the latter company having an absolute paper title, conveyed the property to the Association. It further shows that, although the company had the legal title under a conveyance from Reese, trustee, part of the purchase money remained unpaid. Now, we come to the proof as to Newman's knowledge of this fact. Morling testifies that he conducted the negotiations in regard to the sale of the property by Reese, trustee, and the Woodberry Company, and that he himself made the arrangement with Reese as to the payment of the purchase money. And in answer to the 13th cross-interrogatory, he says the fact that the Woodberry Company had given to Reese, trustee, its notes, amounting to over seven thousand dollars, on account of the purchase money, was never to his knowledge communicated to the Maryland Association or to any one representing it.

It thus appears from the testimony of Morling, the appellee's own witness, that he conducted the negotiations for the sale of the property by the Woodberry Company to the Maryland Association, and that the arrangements in regard to the payment of the purchase money due by said company to Reese, trustee, and that neither the Association nor Mr. Newman, the attorney of the Association, knew anything about these arrangements—that is to say, they knew nothing about the seven thousand dollars due by the Woodberry Company to Reese, for which the company gave its notes. And this is the unpaid purchase money of which it is contended that Newman had notice. There are, we admit, some circumstances arising from the relations of Newman to the parties from which it may be conjectured that he must have known that the Woodberry Company had given its notes to Reese for the balance of the purchase

money; but the proof is altogether insufficient in our judgment to prove such knowledge. In the determination of the question we are deprived of the benefit of the testimony of Reese, trustee, and Newman, both of whom are dead. And, besides, we are dealing with transactions which occurred twenty years ago and in regard to which the recollection of the witnesses, with the exception of Morling, is imperfect and obscure. And there is nothing in his testimony which tends to show that Newman had notice.

The counsel for the appellee is mistaken in saying that Newman was one of the directors of the Maryland Association at the time it bought the property in question from the Woodberry Company. Mr. Hooper testifies that the directors at the that time were Messrs. Hooper, Numsen, Sauerberg and Hammond.

For the reasons we have stated the motion for re-argument will be overruled.

*Motion overruled.*

(Decided April 4th, 1895.)

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## EMANUEL McLAUGHLIN vs. GARRETT B. McLAUGHLIN AND OTHERS.

*Tenants in Common—Rents and Profits—Merger—Life-interest in Land—Age of Life-tenant.*

One tenant in common, who occupies the common property, is not liable to his co-tenants for use and occupation, unless there has been an actual ouster of the co-tenants.

Where the life interest of a party in a moiety of the land owned in common is conveyed to one co-tenant, the life estate is not thereby merged, and the purchase does not enure to the benefit of all the co-tenants.

Where land is sold under a decree and there is no direct proof of the age of a person entitled to a life estate in one-half thereof, in order to ascertain the amount to be allowed for that interest, the Auditor is justified in assuming that such person is more than sixty years of age, when it is proved that he was married forty-six years before the date of the audit.

Appeal from an order of the Circuit Court for Allegany County, (HOFFMAN, J.) overruling exceptions to an Auditor's account distributing the proceeds of land sold under a decree for partition, and finally ratifying the same.

The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Joseph Sprigg* and *J. W. S. Cochrane* for the appellant.

*R. T. Semmes* for the appellees.

BRISCOE, J., delivered the opinion of the Court.

The bill in this case was filed for the sale of the real estate of Rosanna and Laney McLaughlin, of Allegany County, for the purposes of partition, and for an account of rents and profits. At the time of the sale, the heirs at law



were a brother, the plaintiff, and brothers and sisters and their descendants, the defendants. The interest of Rosanna was subject, however, to the life interest of her husband, Garrett B. McLaughlin, who survived her, but who subsequently conveyed his interest by deed to Daniel J. McLaughlin, a brother of the sisters, Rosanna and Laney.

The land was by the consent of resident parties sold under the decree, and the sale duly ratified. And the questions for our considerations arise upon exceptions to the Auditor's Report and Account, distributing the fund among those entitled thereto.

The first ground of exception is stated to be, because the Auditor does not charge the defendants with the fair annual rental occupation value of the property. Now it is well settled that one tenant in common who occupies the common property, cannot be held liable to his co-tenants for use and occupation unless there has been an actual ouster of his co-tenants. *Israel v. Israel and Wife*, 30 Md. 123.

Tenants in common are jointly seized of the entire estate, and each has an equal right of entry and possession; the possession of one is the possession of all, and ouster will not be presumed from exclusive possession by one co-tenant, but actual ouster must be proved; there is no constructive ouster among tenants in common, but positive acts of hostility must be shown to constitute disseisin. *Van Bibber's Lessee v. Ferdinand Frazier*, 17 Md. 436.

The record in this case discloses no evidence which proves an actual ouster, or that the defendant, co-tenant had excluded the plaintiff co-tenant from the possession or the occupation of the property. The onus of proving the actual ouster was on the party alleging it, and this he failed to do. These are familiar principles of law, and are too well settled to need the citation of authority. The third exception is based upon the objection that the Auditor allows Daniel J. McLaughlin's heirs for the life estate of Garrett B., when the purchase thereof should have enured to the benefit of all the co-tenants.

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The proof shows that the life-estate of Garrett B. was conveyed to his brother, Daniel J. McLaughlin, on the 12th day of April, 1854, in consideration of the sum of one hundred dollars, and that he died before the audit in the case.

It is contended upon the part of the appellant that the effect of this purchase was to merge or extinguish the life-estate, and that his purchase enured to the benefit of all the co-tenants. Merger, says Chancellor Kent, vol. 4, page 102, Kent's Com., is not favored in equity, and is never allowed unless for special reasons and to promote the intention of the parties. And to the same effect is *Clark et al v. Tennison et al.*, 33 Md. 92; *Dirks v. Logsdon*, 59 Md. 175; *Johnson v. Hines*, 61 Md. 122. No such intent is disclosed by the deed or the acts of the parties in this case, and it would clearly be against equity to allow it to operate here. The authorities cited by the appellant do not sustain his contention, but are cases where a co-tenant purchased an adverse claim or incumbrance. The case of *Lawes v. Lumpkin*, 18 Md. 240, was a bill filed for a partition by an adult heir against the widow and infant heirs and the widow alone. The Court held that the decree was not one in favor of one tenant in common against his co-tenants for an account, but was against the widow who was not a tenant in common of the house she occupied, nor of the rents and profits which she had received.

The eighth exception raises the question of the value of the life-estate of B. Garrett McLaughlin, at the time of the audit.

This, of course, depends upon the proof as to his age. There was no positive proof as to his exact age, but, as was said by the Court below, the undisputed facts and dates furnish some proof and the strongest presumption that he was at the date of the audit over 60 years of age. His wife, Lancy, died prior to 1850, and his daughter, Flora, had died in 1865 at the age of 16. A period of 46 or 47 years must have elapsed between the date of his marriage to Lancy

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and the date of the audit in 1893, thereby leaving but a space of 16 or 17 years between his marriage and birth in order to place his age in 1893, beyond the limit of 60 years. There was sufficient proof to authorize the auditor in fixing his age at over 60 years at the time of the audit. We have considered the other exceptions in the case, although the Court states in its opinion that they were waived and abandoned at the hearing, and we find no such error as would authorize a reversal of the decree ratifying the audit. There being no error in the decree overruling the exceptions and confirming the audit, the decree will be affirmed.

*Decree affirmed with costs.*

(Decided November 22nd, 1894.)

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**RICHARD BERNARD, GUARDIAN OF FLORENCE RUTH  
*vs.* EQUITABLE GUARANTEE AND TRUST COM-  
PANY OF WILMINGTON, DELAWARE.**

*Guardian and Ward—Right of Foreign Guardian.*

An Orphans' Court of this State which has appointed a guardian of an infant then residing here is authorized to require him to transfer the property of the ward to a guardian subsequently appointed in another State, where the infant now resides.

Appeal from the Orphans' Court of Baltimore City. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Richard Bernard & Son*, for the appellant, cited: *Peters v. Peters*, 20 Md. 178; *Cannon v. Cooke*, 32 Md. 484; *Slatery v. Smiley*, 25 Md. 389; *Kraft v. Wickey*, 4 G. & J. 332; *Clay v. Brittingham*, 34 Md. 676.

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*Richard S. Culbreth*, for the appellee, cited: *Corrie's case*, 2 Bland, 504; *Griffith v. Parks*, 32 Md. 8; *Keller v. Harper*, 64 Md. 82; *Forney v. Shriner*, 60 Md. 422; *Budd v. Garri-son*, 45 Md. 418; *Gunther v. State*, 31 Md. 32.

Boyd, J., delivered the opinion of the Court.

This is an appeal taken from an order of the Orphans' Court of Baltimore City, directing Richard Bernard, guardian of Florence Ruth under appointment of said Court, to turn over the funds, &c., in his hands, as such guardian, to the appellee, which was appointed her guardian by the Orphans' Court of the State of Delaware, in and for New Castle County.

The appellee filed a petition in the Court below, in which he alleges, among other things:

That Samuel Benjamin, late of Baltimore City, died in 1890, leaving a last will and testament, which was duly probated in Baltimore; that item "4" of said will empowered his executor to convert his real and leasehold estate into money, the proceeds of which, together with other money coming into his hands as executor, the testator gave to his two children and six grandchildren, and directed that the shares of his minor grandchildren be paid to them as they respectively reach the age of twenty-one years; that the executor qualified and converted the estate into cash, and there was distributed in the administration account to Florence Ruth \$7,466.52; that at the time of the filing of the administration account she was at school temporarily in the State of Maryland, and appellant was appointed her guardian in Maryland; that Florence Ruth is now a resident of Delaware and non-resident of the State of Maryland; that on November 29, 1893, petitioner was appointed her guardian by the Orphans' Court in and for New Castle County, in the State of Delaware, where she then resided, which Court had authority under section 7, Chapter 96, of the Revised Code of said State, to appoint guardians, such guardianship of

females to continue until they are twenty-one years of age or marry; that it has given bond and sufficient security for the faithful performance of its trust, and as such guardian has control of the person of said infant; that the entire amount of personal property belonging to the said infant is the \$7,466.52 which is in the hands of Richard Bernard, in this State, and that she has no real estate from which any income hath or is likely to come into the hands of the petitioner; that petitioner is a body corporate, with power under the laws of Delaware to serve in the capacity of guardian under the circumstances set out in the petition.

A duly authenticated copy of the record of its appointment and qualification of the bond so given by it and the affidavit of the chief clerk of the said Orphans' Court of its sufficiency were filed with the petition.

It then says that Richard Bernard, guardian of Florence Ruth, be required to render to the Court an account of all the property in his hands belonging to her, and that an order may be passed for the payment, transfer or delivery of such property by the said Richard Bernard, guardian, to the petitioner.

The appellant filed an answer admitting that Florence Ruth was then residing in Newark, Delaware; where she went in June, 1893, but alleging that she had resided in Baltimore, except for some short intervals, since her birth. He admits that the share of Florence Ruth in the estate of Samuel Benjamin was \$7,466.52, and alleges that he had invested the same in ground rents, etc., under the order of the Orphans' Court of Baltimore City, but denies the right of the appellee to interfere with him. The answer sets out at some length the circumstances under which the appellant was appointed; and the real question presented is whether a foreign guardian has the right to obtain an order from an Orphans' Court of this State which had appointed a guardian to require the latter turn over the estate to the guardian appointed in the State where the infant resides.

It is admitted by an agreement of counsel that the ap-

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appellee was duly incorporated under the laws of Delaware with power to serve as guardian ; that it was appointed guardian of Florence Ruth on November 19th, 1893, by the Court authorized by said State to appoint guardians (the Orphans' Court in and for New Castle County, State of Delaware), such guardianship to continue until the age of 21 years or marriage, and that it has given good and sufficient security for the faithful performance of its trust as such guardian. The petition follows very closely the language of the section of Art. 93 of the Code relative to foreign guardians. The evidence shows that Florence Ruth was at the time the appellee was appointed, a resident of Delaware—whatever may be the facts as to her former residence. But the appellant claims that inasmuch as he was regularly appointed in this State, the Orphans' Court which appointed him has no authority to require him to turn over the property of his ward in his hands, and intimates that it is simply an effort of the father of the infant to take his daughter's property from the control of the resident guardian for his own advantage.

The only witness examined in the proceedings before the Orphans' Court was Levi Ruth. The appellant claims that he offered no testimony, beyond such admissions as are in the record, because the Court decided that no further evidence would be admitted.

If he desired to have this Court pass on the action of the Orphans' Court in that respect, of course it should have been brought here in the regular way.

The appeal was taken from the judgment and order of the Court directing the delivery of the estate of Florence Ruth to the appellee, and we are confined to what is presented by the record. The testimony of Levi Ruth is, that his daughter resided in Delaware, which is uncontradicted ; in fact, the answer admits that "it is true, as alleged in sixth paragraph of said petition, that said Florence Ruth is at present residing in Newark, Delaware, where she went in June last." It is, therefore, proven that she is a non-resi-

dent of Maryland, and resides in Delaware. The petition complies with all the requirements of sections 197 and 198 of Art. 93, of the Code, and the proof in the case sustains all the essential allegations made in it.

It is contended by the appellant that the Orphans' Court had no power to direct a guardian appointed by the proper authority in this State to turn over the property in his hands to a guardian appointed in another State, although the ward may reside there. He contends that sections 195 to 203 of Art. 93, which are under the subdivision of "Guardians and infants not residing in this State," must be construed together, and the expression used in section 195, "having no guardian appointed in this State," must be read into the other sections, and hence section 196 must be construed to apply only to a case where there is no guardian in this State. We do not agree with him in that construction. Those sections, as codified in the Code of 1888, are the same as those in the Code of 1860.

Section 195 authorizes the Orphans' Court of the county or city in this State in which there is property, or debts, or choses in action due or recoverable, of non-resident infants having no guardian appointed in this State to empower a foreign guardian to take possession of such property and to sue for and recover such debts or choses in action, and to act in all respects as if such guardian had been appointed by some one of the Orphans' Courts in this State, upon his complying with certain requirements prescribed in that section. Without such statute a foreign guardian could not proceed in this State, as was decided as early as *Kraft v. Wickey*, 4 G. & J. 332.

Section 196, as amended by the Act of 1890, chapter 253, provides "that if any non-resident infant shall be entitled to \* \* \* any legacy, bequest or distributive share in any personal property in the hands of any administrator or *guardian in this State*, and such infant has a guardian regularly appointed in the State \* \* \* in which such infant resides, such foreign guardian may obtain

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an order from the proper Court for the payment, transfer or delivery of such proceeds, legacy, bequest or distributive share upon the terms prescribed in the succeeding section."

That section not only does not exempt those cases where there are guardians in this State, but it in terms provides for the transfer of property in the hands of a "*guardian* in this State."

Section 197 prescribes with great minuteness what shall be stated in the petition of the foreign guardian, but neither in terms nor by implication requires the statement to be made that the infant had no guardian in this State. If section 196 was only intended to apply to such cases it is fair to assume that the legislature would have required the foreign guardian to state in the petition the fact that there was no guardian in this State.

But section 199, which determines where the petitions covering the several cases shall be filed, provides that, "if the money or property claimed is in the hands of an executor, administrator or *guardian*, the petition shall be presented to the Orphans' Court of the county in which the administration is granted or *in which the guardian gave bond.*"

It is contended by the appellant that the use of the word guardian may refer to the guardian of some other than the non-resident infant. It is difficult to imagine a case in which the guardian of a non-resident infant could demand of a resident guardian of *another infant* money or property in the latter's hands. If the resident infant died and the non-resident was next of kin, the latter would take through an administration of the estate, not immediately from the guardian of the deceased infant. But assuming that such a case might occur, the statute does not confine the right of the foreign guardian to obtaining property from a guardian of some infant other than the non-resident, and we do not think a reasonable interpretation of these provisions of the Code justifies such a construction.

We have nothing to do with the wisdom of such legislation, but must construe it as we find it. We do not fear,



however, such serious results from this construction of the law as the learned counsel for the appellants suggest.

It is not to be assumed that a parent, or any one having control over the infant, will subject the estate of the latter to costs and other loss by removing him from State to State to annoy the guardians or accomplish some purpose of his own.

The order of the Court below is in no respect in conflict with the case of *Clay v. Brittingham*, 34 Md., 675. The application of a foreign guardian to have the securities, etc., in controversy in that case transferred to him was refused because they were held by a trustee appointed under what are now sections 57, etc., of Art. 16 of the Code, to sell the real estate of an infant at the instance of his guardian. Such trustee and the funds held by him were peculiarly under the control of the Court of Equity, under those provisions of the Code, and could not under the law as it then stood, even pass into the hands of a resident guardian. The statute provided that upon the death of such infant under age, intestate and without issue, the proceeds of such sale should descend or be distributed as the property or estate would if it had not been sold. This Court, in adopting the opinion of the lower Court, held that the sections of Art. 16 must be construed in connection with secs. 196, &c., of Art. 93, and that the latter did not apply to the proceeds of real estate sold under the provisions of Art. 16. Two of the five judges who sat in that case dissented, even under those circumstances. It was not intimated either in the opinion adopted by the majority or in the dissenting opinion that the fact that there was a guardian of that infant in this State (as the record shows) would in any way interfere with the right of the foreign guardian to have the securities, etc., if the provisions of Art. 16 had not stood in the way.

We do not deem it necessary to discuss the question whether the executor of Samuel Benjamin rightly turned over the distributive share of Florence Ruth to the appellant. He is not in a position to deny that. When the

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petition was filed and the final order of the Orphans' Court was passed, the ward was under eighteen years of age. Since then she has reached that age, and the appellant's control over her has ceased, and he would have been required to settle a final account. He is not therefore injured by the act of the Orphans' Court. It is only necessary for him to know that he is authorized to turn the property over under a valid order, which we determine this to be.

When the Orphans' Court is satisfied of the proofs of the facts set forth in the petition and of the sufficiency of the security, it is authorized by section 198 to pass an order for the purposes mentioned in the three preceding sections.

This having been done in this case without committing any error that has been brought to our attention, we must affirm the order.

*—Order affirmed with costs to the appellee, and cause remanded.*

(Decided November 23rd, 1894.)

IN THE MATTER OF THE PETITION OF GEORGE B. WEED  
AND OTHERS vs. THOMAS B. LEWIS.

*Certiorari—Jurisdiction of Justices of the Peace in Attachment Proceedings.*

If a justice of the peace, who has jurisdiction of the subject-matter, subsequently proceeds irregularly or erroneously, the appropriate remedy is by appeal, and a writ of *certiorari* does not lie in such case.

The writ of *certiorari* will only be issued when it is alleged and appears in a *prima facie* manner that the inferior tribunal is without jurisdiction.

Code, Art. 52, sec. 21, providing that, in suits before justices of the peace, when a defendant is returned summoned and fails to appear on the return day, the justice shall fix a subsequent day for trial, does not apply to an attachment issued by a justice; but in that case judgment may be entered on the return day.

Appeal from an order of the Circuit Court for Prince George's County (BROOKE, J.), refusing to issue a writ of *certiorari*. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*William A. Meloy* for the appellants.

The justice had no jurisdiction to enter judgment on the return day of the summons, and his doing this was therefore both irregular and void. Departing from the mode of action prescribed by the statute—to exceed, transcend, go beyond, step outside the limitations of his power—such acts become without jurisdiction, just as much as if he had *ab initio* assumed an authority not given by the statute law. How. (U. S.) 348, 353; *Swan v. Mayor, &c.*, 8 Gill, 150; *Const. of Md.*, Art. IV, secs. 1 and 42; *Boswell v. Otis*, 9 *Wagner v. Shank*, 59 Md. 321; *People v. Judges, &c.*, 24 Wend., 249; *Kinnear v. Lee*, 28 Md. 489; *Windsor v. McVeigh*, 93 U. S., 274, 277, 282, 283.

*Certiorari*, and not appeal, is the proper and only suffi-

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cient remedy in such a case. 3 *Am. & E. Ency. of Law* p. 64, n. 1; 5 N. Y., 572, *People v. Goodwin*; 24 Wend., 249, *People v. Judges*; 39, N. Y., 81, *People v. Assessors*; 29 Ark., 173, *Baxter v. Brooks*; 1 Ark., 144, *Ashley v. Brazet*; Poe's Pr. vol. 2, secs. 723, 820, admits the propriety and necessity of *certiorari* in such a case.

*J. S. Rogers* (with whom were *Messrs. Duckett. and Dent* on the brief), for the appellee.

McSHERRY, J. delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Prince George's County, refusing to issue a writ of *certiorari*. The facts alleged in the application for the writ are substantially these: On the twenty-second day of June, 1894, the appellee caused a writ of attachment and summons to be issued by a justice of the peace of Prince George's County against the appellants, under which attachment certain property of the appellants was seized, and they were notified to appear before the Justice on July 16th, at 10 o'clock A. M., the return day named in the attachment.

They failed to appear on the return day and the Justice entered judgment of condemnation of the property seized. In eight days thereafter the application for the writ of *certiorari* was made. The application was based upon the assumption that the Justice of the peace ought, on the return day, and upon the failure of the defendants to appear, to have continued the case for not less than six, nor more than fourteen days, for trial; and also upon the alleged irregularity that no bond had been given before the attachment was issued.

In the recent case of *Gaither v. Watkins et al.*, 66 Md. 576, it was contended that a *certiorari* ought not to issue in any case where a party has a remedy by appeal or writ of error. But this Court said: "We are not prepared to go to this extent. This much, however, we may say, that as it is a matter resting in the legal discretion of the Court, the

writ ought not to be granted in any case where the party has a right of appeal, except for the purpose of testing the jurisdiction of the tribunal below." Now, the Code of Public General Laws gives to justices of the peace jurisdiction to issue attachments by way of execution (Art. 52, sec. 67, Code), also against non-resident or absconding debtors (Art. 52, sec. 39), and also for fraud (Art. 52, secs. 6 and 45), when the amount claimed in any of these instances does not exceed one hundred dollars. It does not appear by the petition for the writ of *certiorari* to which class of attachments the one complained of belonged, but if it belonged to any and the amount claimed was not in excess of one hundred dollars, the Justice had undoubted jurisdiction of the subject-matter. If having jurisdiction of the subject-matter he subsequently proceeded irregularly or erroneously, this in no manner affected his jurisdiction and the appropriate and only remedy was by an appeal from his judgment to the Circuit Court, for which appeal the law makes ample provision. Code, Art. 5, sec. 83. This proposition was also distinctly decided in *Gaither v. Watkins et al.*, *supra*. As there are no averments in the petition for the writ showing that the Justice had no jurisdiction to issue the attachment in question, the Circuit Court was right in refusing to issue the *certiorari*.

So far as the petition, which is the only thing before us, discloses the facts, there were no irregularities committed by the Justice. As stated, the two grounds set forth in the petition are the failure of the Justice to continue the case beyond the return day for trial on some subsequent date, and the failure of the Justice to require a bond from the plaintiff before issuing the attachment. The first ground is founded on the assumption that section 21 of Article 52 of the Code applies to writs of attachment. That section provides that when a defendant is returned summoned and fails to appear on the return day, the Justice shall fix a subsequent day for trial, not less than six, nor more than fourteen days from the return day.

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It is clear, we think, that this provision has no relation to attachments, but applies only to ordinary suits or actions instituted before a magistrate. Section 42 of the same Article directs that if the defendant or the garnishee shall not show cause to the contrary, the Justice may condemn the property; and Section 44 requires this cause to be shown by the garnishee on the *return day* of the attachment, and no other provision exists giving the defendant any other or different day to appear except section 43, which has no application as the case now stands. The other objection is equally untenable. A bond is required in attachments for fraud. The petition does not disclose that the attachment complained of was such a proceeding and we are not warranted in assuming that it was.

It is thus apparent that nothing has been set forth on the face of the petition to show that the Justice of the peace had no jurisdiction in the premises; and, as the writ of *certiorari* will only be issued where it is alleged and appears at least in a *prima facie* manner that the inferior tribunal is without jurisdiction, the Circuit Court was right in refusing the writ and its order will be affirmed.

*Order affirmed with costs above and below.*

(Decided November 23rd, 1894.)

CHARLES M. GIFFIN *vs.* MARY CORINNE C.  
BLANDIN AND OTHERS.

*Married Women—Assignment of Mortgage—Concurrence of Husband.*

A married woman who holds a mortgage of realty and promissory notes secured thereby has no power to assign the same without the consent and concurrence of her husband, and no title passes by such assignment to a party taking with knowledge that the assignor was a married woman.

Appeal from the Circuit Court for Baltimore County. The case is stated in the opinion of the Court. The bill of complaint of the appellant set forth the assignment of the mortgage and notes by Mrs. Blandin, that default had been made in payment and prayed for a foreclosure of the mortgage. The defendants were A. Victor Cherbonnier, Sarah C. Cherbonnier, M. Corinne C. Blandin and John T. Blandin, her husband. The answer and cross-bill of Blandin and wife averred that the assignments were made by Mrs. Blandin without the knowledge, consent or concurrence of her husband, and that the same were void acts, and prayed for a decree dismissing the bill and declaring void the assignment and transfer to the plaintiff of the mortgage and notes. The Court below (FOWLER, C. J. and BURKE, J.) decreed that the assignments be set aside and declared null, and that plaintiff surrender to Mrs. Blandin, the mortgage and notes. From this decree the plaintiff appealed.

The cause was argued before ROBINSON, C. J., McSHERRY, PAGE, ROBERTS and BOYD, JJ.

*Thomas Ireland Elliott* for the appellant.

The notes secured by the mortgage were negotiable promissory notes, made payable to the order of M. Corinne C. Blandin and indorsed by her before maturity and for value to the appellant.

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Argument of Counsel.

The notes, therefore, providing as they *expressly* did for the method of their disposition, namely, at "the order" of the payee, they were so disposable. *Miller & Mayhew v. Williams et al.*, 5 Md. 235; *Cooke v. Husbands*, 11 Md. 503. And *in equity* a conveyance by a married woman may be good, though not good *at law*. *Cooke v. Husbands*, 11 Md. 508. And the action here is not a suit *at law* but *in equity*; not an attempt to recover a judgment against Mrs. Blandin personally, but to secure the payment by the mortgagor to the person to whom the order of the mortgagee directed that payment should be made. Nor does the Code prohibit such a disposition by a married woman. This was not a *restrictive*, but an *enabling* act. It did "not *exclude* the ordinary methods of conveyance." *Whitridge v. Barry*, 42 Md. 152. And what could be more *ordinary* than the method of disposing of a negotiable promissory note? That method is well known and is well nigh universal. The husband of the payee of those notes must have known it, and must be supposed to have acted in the light of that knowledge.

But says the appellees the husband did not sign the notes along with his wife. This Court has said that is not necessary. *Whitridge v. Barry*, 42 Md. 152. And even where concurrence of the husband is necessary, that concurrence may be *implied* as well as expressed.

But says the husband, my concurrence cannot be implied. In answer to that we say:

(1.) M. Corinne C. Blandin had a *legal* estate in certain property. She and her husband united in a deed divesting her of that legal title, and he consented that instead of that legal estate she should take negotiable promissory notes made *expressly* payable to her order, and made by the law merchant transferrable upon the sole order of the payee.

(2.) He, the husband, knowingly permits the wife and payee to be the sole custodian of those notes, and he never even sees them or inquires about them, though one of



them was maturing every three months, until after his wife has told him that she has disposed of them.

(3.) And even then, although she knew, and could have told him where they were, he never inquires where they are, but waits until his wife is notified by the appellant, that, by reason of default by Edward G. Cherbonnier, he claims the right to collect the interest note due October 8, 1890, and then undertakes to repudiate the transfer, and to claim that he didn't concur. But his repudiation is not absolute and he asks for delay, and gives assurance that payment will come with a "little patience." (Record, page 27.)

Could there be a clearer case of *implied* concurrence, if concurrence were necessary? Will a Court of Equity strain the law against a party whose injury has been rendered possible by the one who is seeking the strict construction?

The assignee of a note, before maturity and for value, has a right to presume that the assignor had authority to assign. *Citizens' Nat. Bank v. Hooper*, 47 Md. 98. Notice of any disability to assign must be proved. *Maitland v. Citizens' Nat. Bank*, 40 Md. 568; *Carpenter v. Langon*, 16 Wall. 271, *Com. &c., Bank v. First Nat. Bank*, 30 Md. 26. It was not necessary to show the concurrence of the husband in writing. *Wingert v. Gordon*, 66 Md. 110.

It is too clear for argument, that with the notes secured by the mortgage, the right to the mortgage also passed to the assignee. *Clark v. Levering*, 1 Md. Ch. 180; *Ross v. Winn*, 2 Md. Ch. 25; *Ross v. Winn*, 4 Md. Ch. 255; *Timms v. Shannon*, 19 Md. 314; *Byles v. Tome*, 39 Md. 463; *Boyd v. Parker*, 43 Md. 199; *Hewitt v. Coulbourn*, 54 Md. 63; *Carpenter v. Longan*, 16 Wall. 271; *Kemcott v. Supervisors, &c.*, 16 Wall. 452; *N. O. Canal, &c., Co. v. Montgomery*, 95 U. S. 16.

*Samuel D. Schmucker* (with whom were *D. H. Emory* and *George Whitelock* on the brief), for the appellees, cited

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*Wingert v. Gordon*, 66 Md. 110; *Whitridge v. Barry*, 42 Md. 152; *Hull & Hume v. Eccleston*, 37 Md. 519.

PAGE J., delivered the opinion of the Court.

This appeal is from a decree of the Circuit Court of Baltimore City, dismissing a bill filed by the appellant for the foreclosure of a mortgage. About July, 1887, a certain A. Victor Cherbonnier and Sarah, his wife, executed and delivered to Mrs. M. Corinne Blandin, who is the wife of John J. Blandin, a deed of mortgage upon certain property therein mentioned, to secure the payment, at maturity, of a principal note of \$3,989.82, drawn to the order of Mrs. Blandin, and payable five years after date, and twenty interest notes payable respectively at intervals of three months.

These notes, which are ordinary negotiable promissory notes, were given to Mrs. Blandin to secure the payment of the purchase money for the land mentioned in the mortgage which she had sold to Mr. Cherbonnier, and with her husband, had conveyed to him. Immediately upon their execution they were placed in the possession and custody of Mrs. Blandin, and so remained until they were delivered by her to the appellant or his agent. In the early part of March, 1890, Edward Cherbonnier, who is the brother of Mrs. Blandin, applied to Phillip H. Hoffman, a real estate broker, for a loan of \$850. He offered as collateral security these notes, stating at the time that his sister was willing to assign them and the mortgage, and that Mr. Emory (who had drawn them) would give him "every information as to the reliability of the parties \* \* and as to the property and title." The loan was agreed to be made for Giffin, the appellant. When the notes and mortgage were brought to Mr. Hoffman by Edward Cherbonnier, the former asked why Mr. Blandin had not signed the assignment of mortgage, and was informed that he was out of the country in the service of the Government, and that the security was the property of Mrs. Blandin, and she was "willing to give the surety." In fact, at that time, Mr. Blandin, who is an

officer in the Navy, was on duty in California, and had been away in active service since the latter part of 1887, and there is nothing in the evidence which charges him with any information of these transactions with the appellant, or any one else, with regard to the notes and mortgage until his return in May, 1890. He then learned that Edward had obtained possession of them, and it was not until the October following he definitely ascertained what had been done. In that month Mrs. Blandin received a note from Mr. Hoffman informing her that the interest due from her brother, Edward, on the 27th of September, had not been paid and asking her if she would pay it or if he should forward the note of A. Victor Cherbonnier for collection.

This communication, it would seem, passed into the hands of Mr. Blandin; for on the same day he sent to Mr. Hoffmann a reply, in which he stated that "this arrangement was entered into by Mrs. Blandin without his knowledge or consent, and he wished to have the whole thing annulled at once." On the 21st of October, Mr. Hoffman again wrote, this time to the effect that he didn't wish to act hastily, "but must collect the money due promptly." To which Mr. Blandin replied that he had forwarded Hoffman's first letter to Edward, from whom he soon expected to hear, and desired to be informed in case he did not reply within a reasonable time. "Since your desire is to get your money as soon as possible, I can assure you that you will accomplish this object by a little patience than by trying to collect those notes of A. V. Cherbonnier. I write by this mail to Mr. D. H. Emory to ask him to attend to this matter for me." What Mr. Blandin meant by the last phrase can be thoroughly understood by learning what he instructed Mr. Emory to do. The latter states that the purpose of his employment was to "set aside the transfer \* \* \* because it was a blot on his title;" that "Mr. Blandin repudiated the transaction from the very beginning," but he "had said that he would like to see Mr. Elliott (Mr. Giffin's attorney) get this \$850" \* \* \* and that "he would try and induce Mr. Edward Cherbonnier

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to pay it, and that if he could get Mr. Edward Cherbonnier to properly secure him, he would pay Mr. Elliott himself."

Mr. Blandin seems to have been earnestly desirous that Edward should pay his loan, and while carefully refraining from any act or expression which could implicate himself, did offer to pay it, if he could be secured from loss in so doing. The end of all this, however, is stated by Mr. Blandin himself in his letter of 28th October, 1892, to Mr. Emory. He then wrote as follows: "I wrote to Edward

\* \* \* and got a reply a short time ago, in which he declined to give me any security. He wanted me to square up with Elliott and wait until he (Edward) got on his feet, when he would settle with me. I wrote him again and told him that by doing as he asked, I would be worse off than now, and asked him to come to some business-like arrangement. I have so far received no reply from him. I hope to be able to go to St. Louis within a short time, say in two or three weeks, and will then make another attempt to get a settlement. This is the best I can do." On the 20th June, 1891, A. Victor Cherbonnier resold the property to Mrs. Blandin and reconveyed the same to her by a deed in which his wife joined, whereby it is claimed; in view of all the circumstances, the mortgage was merged and extinguished. In this state of the facts, Giffin claiming to be the owner of the notes and mortgage, under the assignment of Mrs. Blandin, filed his bill for a foreclosure, to which Blandin and wife, by their answer and cross-bill, replied that the assignments were made without the knowledge, consent or concurrence of Mr. Blandin, and were, therefore, void, and prayed for a decree dismissing the bill, declaring the assignments void, and requiring the complainants to surrender the notes and mortgage to Mrs. Blandin. To the decree of the Court granting the prayer of the cross-bill, this appeal is taken.

It is obvious from this statement that the only question now to be decided is whether, under all the circumstances of

the case, the assignments of Mrs. Blandin, a *feme-covert* were sufficient to pass title in the property to the appellant.

It is fully established by the proof that at the time he took the notes in question the appellant must be charged with full knowledge that Mrs. Blandin was a *feme-covert*. It is so stated in the mortgage. And when the notes were brought for the first time to Mr. Hoffman, his agent, he was told that Mr. Emory had drawn the notes and would give him every information as to the property, the title, the parties and Mrs. Blandin. Later on, when Edward Cherbonnier brought back the notes signed, Mr. Hoffman asked, "why Mr. Blandin had not signed the assignment of mortgage," and was told "that he was out of the country in the service of the United States," and that the security was the property of Mrs. Blandin and "she was perfectly willing to give the security." The appellant, having taken the notes with this knowledge, is not in the position of a purchaser without notice for value, and can only take such title to the instrument as the single indorsement of a *feme covert* can confer.

Now it is settled law in this State that since the adoption of the Code of 1860, the right and power of disposition of a wife's separate estate other than by way of devise, can only be exercised with the concurrence of her husband. The purpose of the provisions of the Code, relating to this subject, was to enable the wife, with the concurrence of her husband, to dispose of her property by the usual modes, and not to restrict the power of conveyance so as to require that every portion of her property, however minute, should be conveyed by herself and husband by solemn instrument of writing. But whatever the nature of the transfer, from regard to the interests of the husband and wife, it must be made with the concurrence of the husband, express or implied. *Whitridge v. Barry*, 42 Md. 152; *Wingert v. Gordon*, 66 Md. 111. The appellant, therefore, having taken these assignments with full knowledge that the maker of them was a *feme covert*, in order to maintain his

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title must show a concurrence on the part of Mr. Blandin, either express or implied. It was not contended that any express concurrence had been shown. Indeed it could not be successfully so contended, for the proof is clear that at the time of the assignments Mr. Blandin was upon the opposite side of the continent and in absolute ignorance of the transaction, and that when he was informed of it he promptly and decisively expressed his disapproval, and employed an attorney to cause the transfers to be set aside because they "were a blot on his title." Nor is there any evidence that he at any time wavered in his disapproval. It is true that he expressed his solicitude that Edward Cherbonnier should pay his debt to the appellant (and offered if properly secured to pay it for him) but in this there is nothing more than a desire, quite proper under the circumstances, that his wife's brother should not allow his just obligations to remain unsatisfied.

It is insisted, however, that the concurrence of Mr. Blandin may be implied from the circumstances of the case. The argument of the appellant's counsel may be stated as follows: Mrs. Blandin had a legal estate in the property sold to Victor Cherbonnier; she and her husband united in a deed divesting her of that legal title, and he consented she should take in lieu thereof negotiable promissory notes, made expressly payable to her order; of these notes he permits her to be the sole custodian, and fails even to inquire where they are until he learns of the transfer; and that by thus allowing her to keep the control and custody of the notes, thus transferable upon her sole order, there arises an implication of his consent to the transfer to Giffin. But we think that so far as concerns Giffin, informed as he was, neither from the fact that the notes were made payable to her order nor from the additional fact that she was permitted by her husband to retain the custody and control of them if taken separately or together, can such an implication properly arise. Giffin knew it was her property that had been sold to Victor Cherbonnier, and that she was en-

titled as of right to have the proceeds of the sale invested in her own name and to hold in her own possession the muniments of her title. Her husband had no legal right to the custody of the notes, as against his wife, and that he did not take them with him, wherever he was sent by his government, cannot possibly raise any presumption of any kind against him. Nor will these facts taken in connection with the further fact that he united in the deed conveying the land to the mortgagor aid the appellant's case. Her possession of the notes by no means gave her the power to transfer them without his concurrence, though drawn to her order. At common law, such notes would in legal effect be payable to the husband, and an effectual transfer could not be made by the wife without his assent, either expressed or implied. *Miller v. Delawater*, 12 Wend., 435; *Stevens v. Beets*, 10 Cushing, 291; *Chilby on bills*, 21-200-201; 17 Miss. 301.

And under the provisions of our Statutes, as we have already said, no transfer of any part of her property could be effectively made without the concurrence of her husband express or implied. When the real estate was sold, the proceeds thereof having been invested in the notes secured by the mortgage, immediately became subject to the marital protection, and were not liable to be disposed of without the husband's concurrence. Of all this the appellant is charged with knowledge. He knew he was taking the notes, on the simple endorsement of a married woman, without any evidence justifying him in inferring the consent of the husband.

It follows from what we have said that the decree appealed from must be affirmed.

*Decree affirmed.*

(Decided November 23, 1894.)

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Syllabus.

PERRY J. LEWIS, CLAIMANT, vs. D. K. ESTE FISHER  
AND OTHERS.

*Wages of Clerks, Servants and Employees—Fees of an Attorney at Law.*

Code, Art. 47, sec. 15, provides that when any person or body corporate makes an assignment for the benefit of creditors or is adjudged insolvent, or has its property taken by a receiver, all moneys due for wages or salaries to clerks, servants or employees, contracted not more than three months prior thereto, shall be paid in full. *Held*, that an attorney at law employed by such person or body corporate is not an employee within the meaning of the statute, and is therefore not entitled to claim priority for the payment of his fees for professional services.

Appeal from a *pro forma* decree of the Circuit Court of Baltimore City. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and Boyd, JJ.

*Alexander H. Robertson* and *Henry Stockbridge, Jr.* (with whom was *John T. Mason, R.*, on the brief), for the appellant, cited: *6 Am. and Eng. Ency. Law* 637; *Bourier's and Abbott's Law Dictionaries*, verb. "employee;" *Watson v. The Watson Mfg. Co.*, 30 N. J., Eq. 588; *Gurney v. A. & G. W. Ry. Co.*, 58 N. Y., 358.

*Charles J. Bonaparte* (with whom was *William A. Fisher* on the brief), for the appellees, cited: *Elliott Machine Co. v. Speed Co.*, 72 Md. 24; *Rowe v. Yuba County*, 17 Cal. 61; *Wayne County v. Waller*, 90 Pa. St. 99; *Vise v. Hamilton County*, 19 Ill. 78; *Bacon v. Wayne County*, 1 Mich. 461; *Lamont v. Solano County*, 49 Cal. 158; *Presby v. Kliekitat County*, 31 Pacific Rep. 376; *Vane v. Newcombe*, 132 U. S. 237.



McSHERRY, J. delivered the opinion of the Court.

Section 15, of Article 47 of the Code provides in substance that when any person or body corporate shall make an assignment for the benefit of his or its creditors, or shall be adjudged insolvent, or shall have his or its property taken possession of by a receiver "all moneys due and owing from such person or body corporate, for wages or salaries to clerks, servants or employees, contracted not more than three months anterior to the execution of such assignment, adjudication of insolvency or appointment of a receiver shall first be paid in full out of such property or estate, etc." The appellant, who is an attorney at law, claims to be paid in full the fees due him by the American Casualty Insurance and Security Company, an insolvent corporation whose assets were placed in the hands of a receiver by a decree of the Circuit Court of Baltimore City, on November the twenty-third, 1893. Whether he comes within the statute just alluded to and is, therefore, entitled to a priority in the payment of his claim, is the sole question raised by the pending appeal, and that the question is an exceedingly narrow one.

We have before us only the petition of the appellant, together with his itemized account verified by affidavit, and the answer of the receivers. From these it appears that the claim is made up of two charges for salary for the month of December, 1892, and the month of January, 1893, and nine other charges for services rendered and for retainers in particular cases. All of these items, except the last six, which aggregate the sum of nine hundred dollars, bear date more than three months prior to November twenty-third, 1893, and are, in consequence, under the statute, entitled to no priority. The six items with which we have to deal are not items for salary. Four of the six are for retainers in cases undisposed of, and the remaining two are for fees in cases previously tried. The statute has relation to *wages or salaries* due to *clerks, servants or employees*. The appellant was, confessedly, not a clerk of the insolvent company; and unless the sums he claims were *wages or salary*, and unless

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he was when they were earned a *servant* or *employee* within the meaning and intent of the statute, he is not entitled to claim the benefit of the above provision of the Code.

We are not content to dispose of this question by adopting any of the varying definitions of the terms "Wages," "Servants" and "Employees," given in different lexicons, because there are well recognized rules of construction which ought to control in the judicial interpretation of the statute. If we look to the object which the Legislature had in view in adopting this particular act, and if we bear in mind the familiar doctrine that the signification of the words used is to be gathered therefrom, and also from their association and collocation, there would seem to be but little, if any, difficulty in disposing of this contention. Now, the title of the original Act which forms the section of the Code referred to in the beginning of this opinion is, "An act to provide for the payment of wages and salaries due employees of insolvent employers," and the obvious scope of the enactment is, in the language of Bacon, J., in *Coffin v. Reynolds*, 37 N. Y. 639, when discussing a somewhat similar provision of a New York Statute, "to protect the classes most appropriately described by the words used as those engaged in manual labor as distinguished from officers of the corporation or professional men engaged in its service; in short to afford additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns or look sharply after their employer." "To the language of the Act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together they are understood to be used in their cognate sense, express the same relations and give color and expression to each other." *Wakefield v. Fargo et al.*, 90 N. Y. 213. Or, as stated by Lord Bacon, "the coupling of the words together shews that they are to be understood in the same sense." *Bac.*

*Works*, vol. 4, p. 26; see, also, *Com. v. DeJardin*, 126 Mass. 46. The word "employee," though generally and ordinarily quite comprehensive, cannot, if regard be had to the principle just stated, be given a wider meaning than the cognate words "clerks" and "servants" with which it is associated, but must be restricted in its signification so as to include only persons who perform the same kind of service that is due from clerks or servants. "A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive; *specialia generalibus derogant*. *Black Intro.*, sec. 3; *Sandiman v. Breach*, 7 B. & C. 96; *Reg. v. Cleworth*, 4 Best & S. 927; *Kitchen v. Shaw*, 6 A. & E. 729; *Branwell v. Pennock*, 7 B. & C. 536; *Williams v. Golding*, L. R. 1, C. P. 69; *Broom's Max.* 625; *Smith v. People*, 47 N. Y. 337, Allen J. 90 N. Y. *supra*." Now, by no possible construction could an attorney at law be included under the term "clerk," and it is not unreasonable to suppose, looking to the subject-matter with which the legislature was dealing, and to the mischiefs it intended to remedy, that the word "servant" was used in the sense in which it was employed in the common law. "The first sort of servants acknowledged by the laws of England are *menial servants*; so called from being *intra moenia*, or domestics. \* \* \* Another species of servants are called apprentices (from *apprendre*, to learn.) \* \* \* A third species of servants are *laborers*, who are only hired by the day or week, and do not live *intra moenia* as a part of the family. \* \* \* There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity, such as *stewards*, *factors*, *bailiffs*; whom, however, the law considers as servants *pro tempore* with regard to such of their acts as affect their master's or employer's property." *Black Com.* book 1, ch. 14. "Besides these four sorts of servants, may be mentioned (5) clerks and shopmen, who, however confi-

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dentially they may be employed, are servants in the eye of the law; (6) merchant seamen; \* \* \* (7) persons working in mills and factories, or mines and collieries." *Broom and Hadley Com.* book 1, ch. 14. Taking these, for the reason suggested, to be the senses in which the legislature used the term "servant," it is perfectly apparent that an attorney-at-law is not included; and as the more general word "employee" must, by reason of its association and collocation with the two preceding words, be restricted to a meaning synonymous with their meaning, it follows of necessity that it cannot include a person of a higher grade of service than the more limited terms embrace. If this be so, as we think it is, then an attorney-at-law is not within the statute.

This conclusion is supported by many adjudications construing statutes of a kindred character. Thus in *Gordon v. Jennings*, L. R., 9 Q. B. D. 45, it was held under 33 and 34 Vict., ch. 30, which prohibited the attachment of the wages of any servant, laborer or workman, that a *secretary* who was paid an annual salary in quarterly instalments was not included. And in *Aiken, administrator, v. Wasson*, 24 N. Y., 482, it was decided that under section 10 of the General Railroad Act of 1850, which made stockholders liable for all debts due or owing to any of the company's laborers and servants for services performed for it, a contractor to build a part of the road was not embraced. In *Coffin v. Reynolds*, 37 N. Y. 639, a secretary was held not to be included under the terms laborers, servants and apprentices. In *Wakefield v. Fargo et al.*, 90 N. Y. 213, a bookkeeper and general manager was held not within the same words. In *People v. Remington*, 109 N. Y. 631, by affirming the lower court it was held that a superintendent at an annual salary, an *attorney-at-law* and salesmen on salaries and commission are not entitled to preference under the statute. In *Todd v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, contractors were held not to be employees. The same case with very full notes in 18 L. R. A. 305.

But there is another ground upon which the decree appealed from must be affirmed. We have said that the items claimed as due and earned within three months prior to the appointment of the receivers are charges for special services, and in no sense for wages or salary at all. Obviously for such fees, even under the widest construction that might be given to the word employee, a priority could not be claimed. Thus in the recent case of *L. E. St. L. R. R. Co. v. Wilson*, 138 U. S. 501, it appeared that a receiver of the railway was appointed: That the order of appointment provided, "It is further ordered, adjudged and decreed that the said receiver, out of the income that shall come into his hands from the operation of the said railway or otherwise, do proceed to pay all just claims and accounts for labor, material, supplies, salaries of officers and wages of employees that may have been earned or furnished within six months prior to January 1st, 1885." Mr. Wilson claimed to be paid for services rendered by him as attorney. In disposing of his claim, the Supreme Court said: "With respect to the provision in the order of appointment, he claims to come under the descriptive words therein used, 'wages of employees.' \* \* \* On the meaning of the words, 'wages of employees,' he cites the case of *Gurney v. Atlantic and G. W. R. Co.*, 58 N. Y. 358, in which an order directing the receiver of a railway company, thereby appointed, to pay debts owing to the laborers and employees for labor and services, was held broad enough to include a debt due to Hon. Jeremiah S. Black for professional services as counsel. Without criticising that decision, or noticing the special circumstances which seemed in the judgment of that Court to justify the inclusion of professional services within the descriptive words of the appointment, we are of the opinion that the term 'wages of employees,' as used in the order now under consideration, does not include the services of counsel employed for special purposes. *Vane v. Newcombe*, 132 U. S., 220. The terms 'officers' and 'employees,' both, alike, refer to those in regular and continual service. With-

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in the ordinary acceptance of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true he has engaged to render services; but his engagement is rather that of a contractor than that of employee. The services of the appellee, therefore, did not come within the order appointing the receiver." It will be seen from the above extract that the Supreme Court declined to follow the case of *Gurney* in 58 N. Y. We may observe with regard to *Gurney's* case that it was decided by but four of the seven judges who sat, the other three having dissented; and that it apparently ignores, in construing the word "employee," the principle to which we have already alluded, and which Lord Hale concisely expressed in the phrase *noscitur a sociis*, or as applied in that case, that the coupling together of the words "laborers" and "employees" in the order then under consideration, indicated that the term employee, as there used, was designed to have no broader meaning than its conjoined and associated term laborer.

By a *pro forma* decree the Circuit Court of Baltimore City adjudged that the appellant was "neither a clerk, servant or employee of the American Casualty Insurance and Security Company of Baltimore, within the meaning of section 15 of Article 47 of the Code," and that he was not entitled to any priority of payment for any portion of his claim. For the reasons we have assigned we are of opinion that this decree is right and we shall accordingly affirm it.

*Decree affirmed with costs above and below.*

(Decided November 23d, 1894.)

SOLOMON HOWSER *vs.* CUMBERLAND & PENNSYLVANIA RAILROAD COMPANY.*Presumption of Negligence.*

There are some accidents from the nature of which a presumption of negligence arises, according to the maxim, *res ipsa loquitur*.

Plaintiff, while walking in a footpath along the roadbed of the defendant, but not upon its right of way, was injured by half a dozen cross-ties which fell upon him from a gondola car attached to a train passing on defendant's road. *Held*, that these facts gave rise to a presumption of negligence on the part of the defendant.

## Appeal from the Circuit Court for Washington County.

This was an action to recover damages for a personal injury alleged to have been caused by defendant's negligence. The plaintiff testified that while walking home to dinner over a path usually taken by him between the railroad and some private dwelling houses in the city of Cumberland, he saw defendant's train approaching on the outside and nearest track to him, and when the train got opposite to him he saw a gondola car of said train piled up with railroad cross-ties (and he supposed there was a jar on the track) and a part of the said load of ties slipped off the car and about half a dozen of the ties fell on him and broke one of his legs in two places, and dislocated the ankle joint of the other leg and inflicted other injuries about his body, from which injuries he was laid up for a long time, and has been permanently incapacitated for labor ever since, except as to light jobs.

The city surveyor of Cumberland testified that he had made a survey of the land of the defendant near the place where the accident happened; that the land of the defendant extended to the end of the cross-ties of the defendant's

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road at that place and no further, and at that point the distance between the track and the fence was nineteen feet, and that the distance from the outside rail of defendant's track to the end of the cross-ties was fifteen or eighteen inches, and that the side of an ordinary gondola car projects over the rail twenty-one inches.

The defendant offered no evidence, but at the conclusion of the plaintiff's case asked the Court to instruct the jury that "upon the pleadings in the cause and the evidence given to the jury by the plaintiff he is not entitled to recover." To the granting of this prayer by the trial court, (STAKE, J.), the plaintiff excepted, and, the verdict being for the defendant, appealed.

The cause was argued before ROBINSON, C. J., BRYAN. McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*J. W. S. Cochrane*, for the appellant, cited: *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Scott v. London Dock Co.*, 3 Hurl. and Colt. 600; *Christie v. Griggs*, 2 Camp. 79; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Byrne v. Boodle*, 2 Hurl. and Colt. 726; *Mulcarus v. City of Janesville*, 67 Wis. 26; *Cummings v. Nat. Furnace Co.*, 60 Wis. 611; *Ultrick v. McCabe*, 1 Hilton, 252; *Trainer's Case*, 33 Md. 554; *Beach on Cont. Neg.*, sec. 38; *Stringer v. Frost*, 116 Ind. 477; *Cooley on Torts*, 62; *N. C. Ry. Co. v. State*, 29 Md. 434.

*Robert H. Gordon* (with whom was *H. Kyd Douglas* on the brief), for the appellee, cited: *Sweeney v. R. R. Co.*, 10 Allen, 368; *R. R. Co. v. Griffin*, 100 Ind. 221; *Mathew v. Bensel*, 51 N. J. Law, 30; *Larramore v. Iron Co.*, 101 N. Y. 391; *Bedell v. Berkey*, 76 Mich. 435; *Ry. Co. v. Barnhardt*, 115 Ind. 399; *Ricketts v. B. & O. R. R. Co.* 69 Md. 494; *B. & O. R. R. Co. v. Schroeder*, 69 Md. 556; *Allison's case*, 62 Md. 486; *Savington's case*, 71 Md. 591; *Central R. R. Co. v. Brinson*, 10 Geo. 207; 19 Am. and Eng. R. R. Cases, 42.



ROBERTS, J., delivered the opinion of the Court.

This appeal brings before us for consideration a single question, yet one of interest and some importance, the determination of which is not entirely free from difficulty. In the fall of 1892, whilst the defendant was passing from the place of his employment to his home, he walked over a foot-path on the land of William E. Walsh, in the city of Cumberland, which had been for twenty years used by various persons. This path extended along the roadbed of the appellee, but *not upon* its right of way.

As the plaintiff proceeded on his way to his home the defendant's train was approaching on the outside track, the one nearest to him. Attached to the train was a gondola car loaded with railroad cross-ties; when the car containing the cross-ties got opposite to where he was walking, a part of the ties slipped off of the car and about a half a dozen fell upon him and broke one of his legs in two places and otherwise injured him. In the testimony he says, "*he supposed there was a jar on the track.*"

The case was tried before a jury, the Court, at the instance of the appellee, instructing them "that upon the pleadings in the cause and the evidence given to the jury the plaintiff was not entitled to recover." If the defendant was entitled to recover, it was only because of the insufficiency of the proof offered by the plaintiff in that connection. We will now proceed to consider the instruction.

Whilst the general rule undoubtedly is, that the burden of proof that the injury resulted from negligence on the part of the defendant, is upon the plaintiff, yet in some cases, "the very nature of the action may, of itself, and through the presumption it carries, supply the requisite proof." *Wharton on Negligence*, par. 421.

Thus when the circumstances are, as in this case, of such a nature that it may be fairly inferred from them that the reasonable probability is that the accident was occasioned by the failure of the appellee to exercise proper caution which it readily could and should have done; and in the

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absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it. In the case of *Byrne v. Boadle*, 2 Hurl. & C., 722, the plaintiff was walking in a public street past the defendant's shop, when a barrel of flour fell upon him from a window above the shop and seriously injured him. The Court held that these facts constituted sufficient *prima facie* evidence of negligence for the jury to cast on the defendant the onus of proving that the accident was not caused by his negligence. POLLOCK, C. B., said: "There are many accidents from which no presumption of negligence can arise, but this is not true in all cases. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be *prima facie* evidence of negligence."

Shortly after this decision, a similar case, that of *Scott v. London Dock Co.*, 3 Hurl. & C. 596, was decided in the Exchequer Chamber. The plaintiff proved in this case that while in the discharge of his duties as a customs officer he was passing in front of a warehouse in the dock and was felled to the ground by six bags of sugar falling upon him. The Court said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Then followed the leading case of *Kearney v. London, Brighton and South Coast Railway Co.*, L. R. 5, Q. B. 411. This case underwent great discussion with a view to the settlement of the true principle governing it. The facts were,

that the plaintiff was passing on a highway under a railway bridge when a brick fell and injured him on the shoulder. A train had passed over the bridge shortly before the accident. The bridge had been built three years, and was an iron girder bridge resting on iron piers on one side and on a perpendicular brick wall with pilasters on the other, and the brick fell from the top of one of the pilasters, where one of the girders rested on it. A motion was made for a nonsuit on the ground that there was no evidence of negligence to leave to a jury. The Court of Queen's Bench, by a divided vote, held that this was a case to which the maxim *res ipsa loquitur* was applicable; or, in other words, that there was *prima facie* evidence of negligence. KELLY, C. B. delivering the opinion on the appeal, said: "We are all agreed that the judgment of the Queen's Bench must be affirmed \* \* \* The question, therefore, is whether there was any evidence of negligence on the part of the defendants, and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The Lord Chief Justice, in his judgment in the Court below, said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears, without contradiction, that a brick fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. No doubt it is humanly possible that the percussion of the iron girder, arising from expansion and contraction, might have gradually shaken out the mortar, and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants, from time to time, to inspect the bridge and ascertain that the brickwork was in good order and all the bricks well secured. If there were necessity for other evidence, the case is made still stronger by the evidence of the plaintiff which was uncontradicted on the part of the defendants, that after the accident on fit-

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ting the brick to its place several other bricks were found to have fallen out."

And, again, in the case of *Briggs v. Oliver*, 4 Hurl. & C. 403, the plaintiff, going to a doorway of a house in which the defendant had offices, was pushed out of the way by his servant, who was watching a packing-case belonging to his master and was leaning against the wall of the house. The plaintiff fell, and the packing-case fell on his foot and injured him. There was no evidence as to who placed the packing-case against the wall or who caused it to fall. The Court held that there was a *prima facie* case against the defendant to go to the jury.

We have made full reference to the foregoing cases as showing the views of the English Courts upon this question. These and many other English and American cases clearly establish the fact that it is not requisite that the plaintiff's proof, in actions of this kind, should negative all *possible* circumstances which would excuse the defendant, but it is sufficient if it negatives all *probable* circumstances which would have this effect. *Thompson on Negligence*, 1229. It is also well settled that the cause of accident must be connected with the defendant, either by direct evidence that it is his act, or that it is under his control, before it can be presumed that he has been negligent. *Higgs v. Maynard*, 12 Jur. N. S. 705; *Welfare v. L. B. & S. C. Ry.*, L. R. 4 Q. B. 693; *Smith v. G. E. Ry. Co.*, L. R. 2 C. P. 10. When, however, there is no duty upon the plaintiff, as under the facts of this case, or when the duty which he has to perform has been performed by him, it is clear that the negligence of the plaintiff is out of the question, and if the accident is connected with the defendant the question whether the phrase "*res ipsa loquitur*" applies or not becomes a question of common sense. *Whittaker's Smith on Negligence*, 422.

The American cases sustaining the maxim *res ipsa loquitur* are numerous and to the point. In the case of *Cummings v. The National Furnace Co.*, 60 Wis. 603, the defendant company

was engaged in unloading iron ore from a vessel by means of a crane to which was attached a bucket. Whilst so engaged the bucket tipped and threw its contents upon a seaman lawfully working upon the deck of the vessel. The Court said: "The accident itself was of such a character as raised a presumption of negligence either in the character of the machinery used or in the care with which it was handled, and as the jury found the fault was not with the machinery, it follows that it must have been in the handling, otherwise there is no rational cause shown for its happening.

The leading American case, however, appears to be *Mullin v. St. John*, 57 N. Y. 567. The opinion of the Court was delivered by DWIGHT, C., and is a most able and exhaustive examination of the subject. He cites with approval many of the English and American cases, to which reference is made in this opinion. The case was one in which the walls of a building, without any special circumstances of storm or violence, fell into one of the streets of the city of Brooklyn, knocking down the plaintiff, who was on the sidewalk, and seriously injuring her. The Court said: "There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling, unless it was badly constructed or in bad repair, as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind necessarily seeks for a cause for the fall. That is apparently the bad condition of the structure. This again leads to the inference of negligence, which the defendant should rebut."

To like effect are *Lyons v. Rosenthal*, 11 Hun. 46; *Edgerton v. N. Y. & H. R. R. Co.*, 39 N. Y. 227; *Krist v. M. L. S. & W. R. Co.*, 46 Wis. 489; *Smith v. Boston Gas Light Co.*, 129 Mass. 318; *Claw v. National City Bank*, 1 Sweeney, 539; *Brehm v. Great Western, &c.*, 34 Barb. 256; *Sullivan v. Vicksburg, Shreveport and Pacific R. Co.*, 259 La. Ann. 800; *Hays v. Gallagher*, 72 Pa. St. 136;

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*Thomas v. W. U. Telegraph Co.*, 100 Mass. 156 ; *Dixon v. Pluns*, 98 Cal. 384.

We have referred to numerous cases as illustrating the views which we entertain, because the question on this appeal has not heretofore been determined by this Court. Cases resting in contract have frequently received our consideration, and they are generally free from difficulty, because the mere happening of the accident will be *prima facie* evidence of a breach of contract without further proof, while in those not resting in contract ~~"it must not only appear that the accident happened, but the surrounding circumstances must be such as to raise the presumption of a failure of duty on the part of the defendant toward the plaintiff."~~ Article, *Res ipsa loquitur*, by Judge Seymour D. Thompson in 10 C. L. J. 261. None of the cases herein relate to those resting in contract.

In all cases of the character we have been considering, the most careful scrutiny should be given to the circumstances attending the accident, and whilst an excellent authority has said that after all the question resolves itself into one of common sense, we would add that it should be of a high order. For it is unquestionably true that the authorities are by no means in accord on the question which arises out of the doctrine of *res ipsa loquitur*.

The facts of this appeal are very meagre, but they by no means lie on the border line, nor even close to it. Here you find the plaintiff traversing a path over which the defendant had no dominion, for the plaintiff was rightfully there. The defendant moves its cars over its roadway along said path, and from a gondola car there slips an half dozen railroad cross-ties falling upon the plaintiff and seriously injuring him.

The plaintiff was guilty of no negligence in being where he was at the time he was injured, and in so far as the defendant's rights are involved, the principle is the same whether he was on the land of Mr. Walsh or on his own land. The accident happened at the hour of noon, as the

plaintiff was on his way to his dinner. There is no contention that it did not happen just as the plaintiff has himself represented. The plaintiff had no control over, nor was he in any way connected with the loading or management of the cars or trains upon defendant's road.

If the cross-ties had been properly loaded there existed no reasonable probability of their falling off. A cross-tie is defined to be a sleeper, connecting and supporting the parallel rails of a railroad. Stand. Dict. 444. Its figure and dimensions are familiar, and its flat surfaces and weight illustrate how readily they can be loaded so as to form an almost compact body of wood, if reasonable care be exercised in placing them on the flat bottom of the car, and proper lateral support be given them. If by accident, the ties had become displaced, it was a duty incumbent upon the defendant and its servants to have readjusted them in such manner as to have prevented the happening of an accident. It was the duty of the defendant and its servants to have carefully loaded said cross-ties upon its cars and it was equally its duty to have exercised reasonable care in seeing that its train was transported in such condition as to avoid all reasonable probability of injury.

If the presumption arising out of the doctrine of *res ipsa loquitur* finds proper application anywhere, we think this is a case in which it should be applied. In conclusion, taking the proof as we find it in the record, we think the case should have been permitted to go to the jury with proper instructions from the Court.

The judgment must be reversed.

*Judgment reversed and new trial  
awarded.*

(Decided December 18th, 1894.)

McSHERRY, J., dissented and delivered the following opinion, in which FOWLER, J., concurred :

I am constrained to dissent in this case, and I will state very briefly my reasons for the opinion I have formed.

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An accident happened and the plaintiff was injured. There was no relation of passenger and carrier existing between the plaintiff and the defendant, and there was no proof of any antecedent negligence on the part of the defendant, and no proof as to what caused the cross-ties to fall from the moving cars. Under these circumstances the court below, properly I think, took the case from the jury; but a majority of this court now reverse that ruling and hold that there was sufficient evidence for the jury to consider on the question of negligence.

The plaintiff was not a passenger. As I understand the repeated rulings of this Court it is the settled law in Maryland that when that relation does *not* exist no presumption of negligence can ever arise from the mere fact that an injury has been sustained. Something more must be shown. Where the defendant is under no contractual obligation to the plaintiff the mere occurrence of an accident resulting in injury furnishes no evidence of causative negligence on the part of the defendant. This principle is well illustrated in *Hammock v. White*, 11 C. B. N. S. 588. It is incumbent, therefore, on the plaintiff in such cases not only to show an injury, but also to show that the defendant had been guilty of some negligence which produced that injury. There must not only be negligence, but, between that negligence and the injury complained of, there must be the relation of cause and effect. Negligence which produces no injury furnishes no right of action, and an injury not caused by any negligence cannot justify a recovery. Proof, then, of both the injury and the negligence which caused it must be given. They are both indispensable constituents of the plaintiff's case, and proof of the one cannot, in the absence of a contractual duty, establish the existence of the other, unless, in obedience to some unvarying physical law, you can say with unerring certainty that the given effect necessarily proceeded from a particular, exclusive cause. If, consistently with known laws, a particular effect could not exist, except as the result of a single cause, then, when the effect does



exist, that single cause and no other must, in the nature of things, have produced it; and to that extent proof of the effect is proof of its cause, or of what its cause was. But if the effect could have resulted from any one of several causes, then, it is obvious, that something more than the effect itself is required to be shown before it can be determined from which one of those several causes the given effect did in fact, in the particular instance, proceed. More especially is this so if, of these several causes, some are of such a nature that they impose no obligation on the defendant at all. It seems to me, then, to follow that where the injury could have happened in consequence of an accident pure and simple, unmixed with negligence, and for which and its consequences the defendant is not responsible, and where it could, under the proven facts, equally have happened as the result of actionable negligence for which the defendant would be responsible, and there is no evidence to show that it did *not* happen or *could not* have happened, by sheer accident; or, that it *did* happen, or *could only* have happened as the result of negligence; the plaintiff upon whom the burden to show *how* it did happen always rests, would fail to sustain his case. And he would fail, because his proof in the case supposed would be as consistent with the hypothesis that the injury was caused by non-actionable accident, as with the opposite theory that it was caused by actionable negligence.

Now, in the case at bar, the only evidence is that as the freight train approached the plaintiff, who was walking towards it just outside the right of way, he thought he saw a jar on the track, as he expressed it, and the cross-ties fell off from the moving car when it was opposite to him, and struck and injured him. There is no evidence in the record that these ties had been improperly loaded on the car; or to show when, where or by whom they were loaded; or how far they had been hauled; or to show that the car upon which they had been loaded was out of repair; or that the track was not in proper and safe condition; or that

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the employees of the defendant were unskilful, careless or incompetent. The naked fact that the ties fell off whilst the car was in motion is all the evidence that was adduced. If it had been shown, or could rightly be assumed as a fact established by known and admitted physical laws, that these ties could not have fallen off at that particular place, except *because* they had been negligently loaded, or *because* of some other negligence on the part of the defendant, I concede there would then have been sufficient evidence before the jury to justify them in concluding that there had been antecedent negligence which, through the falling of the ties, caused the injury ; because then, the probability of the existence of a non-actionable accident as the cause of the injury would necessarily be prescinded. But with the numerous probabilities existing that the same result could have happened, though there had been no anterior negligence, the jury, if allowed to consider the case at all, would have been at liberty to speculate between these conflicting probabilities, none of which were excluded by the proven facts, and to base a verdict, at best, upon mere conjecture.

The cases relied upon by the appellant are distinguishable from the one at bar. Take, for example, the case of *Byrne v. Boodle*, 2 Hurl. & Colt. 726. There the barrel rolled out of the warehouse and fell upon a person rightfully passing along the public thoroughfare below, and though no evidence was offered to show what caused the barrel to roll out, the case was allowed to go to the jury upon the theory, I take it, that according to the fixed laws of dynamics it was physically impossible for the barrel to roll at all without the application of some force which must have been applied on the defendant's premises, whilst those premises were so unguarded as to permit the barrel to roll out of the door. Had the door not been left open, when it ought to have been closed, or at all events ought to have been protected by a servant or watchman, the barrel could not have rolled out as it did. Allowing the door to remain open or unguarded was an act of negligence. Now, negligence in

the abstract is a nullity, but in the concrete it is either positive or negative; that is to say, it consists either in the doing of some act which ought not to have been done, or in the omission to do some act that ought to have been done. In both instances it is the breach of a duty that is owed to another. In the barrel case the plain duty which the owner of the warehouse owed to the public, and to every individual who was entitled to use the public street, was to keep the door so closed or guarded that a barrel could not roll out in the way it did roll out, no matter how it received the impetus; and the failure to do this was clearly an act of negligent omission which directly caused the injury. Had the omitted duty been observed it was physically impossible for the barrel to roll out as it did. But the case at bar is widely different.

It does not follow that because the logs fell off the car they were negligently put on; for, though properly loaded, they may have become displaced, without negligence, by the jarring incident to a moving train; or, by other means, they might have fallen without involving a breach of duty toward any one, and, therefore, without involving antecedent negligence. To conclude that there was negligence because an injury happened is to assume, as proved, the very fact to be proved. It seems to me, then, that some evidence tending to show negligence ought to have been adduced, and that the Court below was right in withholding the case from the jury upon the failure of the plaintiff to adduce such additional evidence.

I am authorized by JUDGE FOWLER to say that he concurs in these views.

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Syllabus.

## JOHN A. BOTTOMLY vs. THOMAS F. BOTTOMLY.

*Action for Causing Discharge of Servant—Libel.*

A declaration setting forth that the defendant, maliciously intending to to effect the discharge of plaintiff by his employer, did maliciously write to the employer a letter, stating defendant's displeasure at something the plaintiff was alleged to have said, described as too bad to mention, in consequence whereof plaintiff was discharged, does not set forth a good cause of action, since it does not aver that the defendant's statement concerning the plaintiff was false.

Appeal from the Circuit Court for Anne Arundel County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*James M. Munroe*, for the appellant.

An action for damages will lie where the two following elements occur: (1) An intentional wrongful act on the part of the defendant directed against the plaintiff; (2) Actual damages resulting to the plaintiff as the consequence of the wrongful act of the defendant. *Addison on Torts* (1880), vol. I, secs. 1, 16, 17, 18, 19, 22, 39, 40, 41. *Lueke v. Clothing Cutters, &c.*, 77 Md. 396; *Lynch v. Knight*, 9 H. L. C. 577. An action will lie against the defendant for procuring a third person to break his contract with the plaintiff. *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333; *Anson on Contracts*, p. 206; *Pollock on Torts*, 450-1; *Chipley v. Atkinson*, 23 Fla. 206. If by the malicious and wrongful act of defendant, a contract is broken between a third party and the plaintiff, by which injury ensues to the plaintiff, the defendant when sued for damages cannot set up as a defence that his wrongful and malicious act was not the *proximate cause* of the injury, but that the third party alone who broke the contract is re-

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sponsible. At one time this objection would have been held conclusive (*Vicars v. Wilcocks*, 8 East. 1; S. C. 2 Smith's Ldg. Cases, 1,) but this opinion is now disapproved. *Lynch v. Knight*, 9 H. L. C. 577; Cf. notes to *Vickars v. Wilcocks*, in 2 Sm. Ldg. Cases; *Bowen v. Hall*, 6 Q. B. D. 333; *Knight v. Gibbs*, 1 A. & E. 43.

*E. C. Gantt* (with whom was *John F. Williams* on the brief), for the appellee.

BRYAN, J., delivered the opinion of the Court.

As this case comes before us, the declaration contains only one count, and the question of its sufficiency is presented by a demurrer. This demurrer was sustained by the Court below, and the plaintiff has appealed. The declaration averred that the plaintiff was in the employment of one Chard, and stood high in his regard and esteem, and that the defendant had so great an influence over Chard that he was afraid to offend him, and that the defendant maliciously intending to alienate the regard and esteem of the said Chard from the plaintiff, and maliciously intending to effect his discharge by Chard from his employment, maliciously wrote and caused to be delivered to Chard a letter in the following words: "John (meaning the plaintiff) has said something *hear* of late which I (meaning the defendant) do not like, and myself (meaning the defendant) nor Lethia (meaning defendant's wife) shall never *poot* our foot on the place (meaning the property of said Chard) as long as he (meaning the plaintiff) stays *their*. For they are *to* bad to mention."

The declaration further avers that by reason of the letter, and without any other reason whatever, Chard discharged the plaintiff from his employment, and the plaintiff lost his regard and esteem.

The letter, mentioned in the declaration, stated to Chard the defendant's displeasure at something which the plaintiff was alleged to have said. It was described as something

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too bad to mention. The declaration does not aver that the defendant falsely charged the plaintiff with using the bad language attributed to him. The law does not assume that the charge was false in the absence of an averment to that effect. It must pass judgment on the pleading according to the facts which it sets forth. A true statement in regard to plaintiff's language certainly would not subject the defendant to a liability to damages. The plaintiff would have no legal cause of complaint if he were truly reported as having used very offensive language. Nor can the defendant be regarded as culpable, because he expressed his indignation to be so great that he would have no intercourse with him, not even to the extent of visiting the place where the plaintiff was staying. A man certainly has a right to be indignant when foul language is used respecting him, and to make known to his friends and acquaintances and the public generally that his resentment is so great that he will not go to any place where he would be apt to meet the person who had offended him. This seems to be the overt act which has caused the damage of which the plaintiff complains. If the defendant's letter had charged the plaintiff with conduct which would justly incur scorn and contempt, and would render him unfit for social intercourse; if it had even charged him with the commission of an atrocious felony, he could, nevertheless, maintain no action against the defendant if the charge should be proved true at the trial. It is well known that the truth of the offensive words, written or spoken, is a complete justification for the use of them. The rules of practice require the justification to be specially pleaded. This is the technical form of presenting the defence on the face of the record; but this mode of proceeding is the result of another technical rule, and in no way detracts from the force and effect of the truth as an element in the case, which is destructive of the plaintiff's right of action.

We have implied, in what has been said, that the declaration did not show a cause of action, inasmuch

much as it did not aver that the words of the defendant's letter were false. An examination of the approved precedents will show that in them the words which are the subject of complaint are usually charged as "false, scandalous and defamatory." And our Code, after stating that "whatever facts are necessary to constitute the ground of action, defence or reply, as the case may be, shall be stated in the pleading, *and nothing more*," proceeds to give forms which are declared to be sufficient, meaning, of course, that they contain what is necessary, and nothing but what is necessary. The thirty-fourth form charges that the defendant "falsely and maliciously spoke" certain words; the thirty-fifth, form charges that the defendant "falsely and maliciously printed and published" certain words. Code, Article 75, section 2 and section 23. According to the technical rule which we have mentioned, when the defamatory words are charged in the declaration to be false, the falsity is admitted, unless there is a plea specially alleging that they are true. But if the words are determined to be true, it is of no avail to allege that they were malicious, or that they caused damage to the plaintiff.

We do not question the general rule maintained by the counsel for the plaintiff, that when a wrongful act has been committed the wrongdoer is responsible in a suit at law for the damages resulting from it. But the very foundation of the right of recovery fails in this case, because the unlawful character of the supposed tortious act is not shown. In a very great number of instances the Courts have been called upon to decide actions for infringing legal rights, and the language of the opinions delivered has frequently been very general; but it must always be interpreted with reference to the facts which were presented for adjudication. For instance, where it is said that when the plaintiff has a right he must have a remedy if he is injured in the enjoyment of it; it must necessarily be understood that the injury must be an act which is unlawful in itself, or that it is rendered unlawful by the cir-

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cumstances under which it is committed. Much reliance was placed by the plaintiff's counsel on the decision of this Court in *Lucke v. Clothing Cutters, &c.*, 77 Md. 396. In that case there was evidence competent to prove that the defendant procured the discharge of the plaintiff from an honest employment by which he earned his livelihood, and that this discharge was accomplished by threats which excited in the minds of the employers a well-grounded apprehension that if the plaintiff were not discharged their custom would be seriously diminished, and that great loss would also be caused by an order which would cause all of the union men in their employ to quit their service. We held that the conduct of the defendant was malicious and unlawful, and that it gave the plaintiff a good cause of action. It was a scheme to accomplish an unlawful result by unlawful means. Before leaving this subject we will quote from the Court's opinion a passage which is in entire harmony with what we have said about the necessity of showing that the statements were false which were contained in the letter of the defendant in this case. "Where a contract would have been fulfilled but for the *false* and *fraudulent* representations of third person an action will lie against such person." 77 Md. 408.

The demurrer was properly sustained, and the judgment will be affirmed.

*Judgment affirmed.*

(Decided December 18th, 1894.)



JOHN W. DEEMS *vs.* THE MAYOR AND CITY  
COUNCIL OF BALTIMORE.*Inspection of Milk—Police Power—Constitutional Law—Injunction—  
Ordinances.*

The Act of 1894, ch. 53, authorized the Mayor and City Council of Baltimore to regulate the sale of milk and other food products in that city. Under this statute an ordinance was passed providing for the inspection of milk offered for sale in the city of Baltimore, forbidding the sale of any milk below the standard prescribed by the ordinance, and authorizing the destruction of milk found to be impure according to that standard. *Held*, that the ordinance was valid.

The destruction of milk found to be impure by the Lactometer, under such ordinance, without prior judicial inquiry, is not a taking of property without due process of law.

The constitutional guarantees concerning property and liberty are not to be construed as abridging the power of the State to pass such laws as may be necessary to protect the health and peace of society.

The above statute authorized the municipality to provide a fine of not more than one hundred dollars for each violation of the ordinance. *Held*, that an ordinance imposing a fine of not less than twenty nor more than fifty dollars was a valid exercise of the power.

Equity has jurisdiction to restrain by injunction the enforcement of an invalid municipal ordinance, the execution of which injuriously affects private rights.

Appeal from Circuit Court No. 2, of Baltimore City. The bill of complaint in this case alleged that certain officers of the Board of Health of Baltimore City, acting under an ordinance of the city, had destroyed a quantity of milk belonging to the appellant, and had declared their purpose to destroy all milk belonging to the appellant and other dairymen which, after inspection by means of a mechanical instrument known as the "Lactometer," and by a test taken with Litmus paper, they should conclude not to be of the standard prescribed by the ordinance. The bill averred that the said ordinance was void, and asked for an

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injunction restraining the Mayor and City Council of Baltimore and the Commissioners and other officers of the Board of Health from taking and destroying the milk of the appellant without a chemical or microscopical examination first made, and without due process of law. The Mayor and City Council demurred to the bill, and from the order of the Court below (HARLAN, J.) sustaining the demurrer, this appeal was taken.

The cause was argued before ROBINSON, C. J., MCSHERRY, FOWLER, PAGE and ROBERTS, JJ.

*Thomas C. Weeks*, for the appellant.

The act of 1894, ch. 53, authorized the Mayor and City Council of Baltimore to provide by ordinance for the inspection and to regulate the sale of milk and other food products and to provide "by a fine of not more than one hundred dollars for each offence for the punishment of violations against such regulations and ordinances." By an ordinance the corporation has imposed a penalty of not less than twenty dollars and not more than fifty dollars, so that, whereas, under the statute, a fine could be imposed by the Criminal Court of from one dollar to one hundred dollars, the minimum fine is, by the ordinance *increased*, and the maximum fine is *decreased*. It was clearly the intention of the Legislature to give a wide latitude to the Criminal Court in adjusting the fine to the quality of the offense. The fine imposed by the ordinance does not express the intention of the Legislature, and the ordinance is in violation of the grant.

The Legislature, by the Act of 1894, ch. 53, legislated upon the subject-matter of the *inspection* of milk and the *regulation* of its sale in Baltimore City, and in the absence of any express authority to *destroy* milk, the corporation had no power to so provide by its ordinance. The Legislature, knowing the existing law relating to the adulteration of milk in Baltimore City (Baltimore City Code, Art. 23, sec. 70,) and the charter powers of the corporation (Balti-

more City Code, "Health," page 158; "Police," page 282), and the mischief intended to be remedied, prescribed by the statute a full and sufficient remedy, and by and within this express legislation respecting the subject-matter, the general powers of the corporation were limited, for by its acts the Legislature enlarges and diminishes the power of a municipal corporation. *Groff v. Mayor, etc.*, 44 Md. 78; *Miersereau v. Miersereau Co.*, (N. J.) 26 Atl. Rep. 682. And a municipal corporation cannot impose a *forfeiture* of property without express legislative authority. *Beach on Pub. Cor.* Vol. 1, sec. 527, and cases in note. *Cooley on Com. Lim.* (6th ed.) 227-248, note. And a statutory grant of power to a corporation is strictly construed in favor of public rights. *Am. & Eng. Enc. of L.*, Vol. 15, 1041; *Anderson v. City of Wellington*, 40 Kan. 173; *Brewington v. Belvidere*, 44 N. J. L. 350, syl.; *Horr & Bemis on M. Po.*, Ord. 20.

Under its general powers (Baltimore City Code, "Health," 158; "Police," 282), the corporation is clothed, within specified limits, with all the legislative power the General Assembly can exert; and of the necessity for its exercise and the means to be used the municipality is the exclusive judge. But this power does not authorize an unlimited control over the business occupations of the people, and the power to regulate does not include a power to confiscate and destroy. *Harrison v. Mayor, &c.*, 1 Gill, 264; *Beach on Pub. Cor.*, vol. 1, sec. 90; *Am. & E. Ency. of Law*, vol. 15, pp. 1178-79; *Ibid*, vol. 18, p. 755; *Vansant v. Harlem Stage Co.*, 59 Md. 333. Police powers are not superior to constitutional limitations. 1 *Dillon on Mun. Corp.*, 142; *Cooley on Const. Lim.* (6th ed.), ch. 16, p. 704; *Stone v. Mississippi*, 101 U. S. 818; *Mayor, etc.*, v. *Scharf*, 54 Md. 517. It is a doctrine not to be tolerated in this country that municipal authorities can declare any particular business a nuisance in a summary mode, and enforce their decision at their pleasure. *Yates v. Milwaukee*, 10 Wall. 498; *A. & Eng. Enc. of L. V.*, 15, p. 1180, note;

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*State v. Mott*, 61 Md. 306 ; *Mayor, &c., v. Radecke*, 49 Md. 230.

By this ordinance the determination of the quality of all milk offered for sale in Baltimore City is left to the arbitrary decision of an Inspector, from whom there is no appeal, who is licensed to destroy the property of the citizen at his pleasure, and by spilling the milk to render impossible any investigation respecting the honesty of his conclusions. By the exercise of such a power any dairyman conducting an honest and legitimate business can, under color of law, be absolutely ruined and his business be destroyed; or the inspector can secure the consignment of all shipments of milk from the counties to himself in the city of Baltimore, thereby guaranteeing the shipper against the destruction of his property for a pecuniary consideration. It is, in a word, an absolute, irresponsible power controlling the entire trade, and it is unreasonable to suppose that the grant of such a power is authorized by the general charter powers of the corporation.

*Thomas G. Hayes, City Counsellor*, (with whom was *William S. Bryan, Jr., City Solicitor*, on the brief), for the appellee.

From the averments of the bill it would appear that there are two reasons assigned by the appellant as the basis of his prayer for equitable relief. First, that the milk in question was destroyed by the inspector "without making any chemical or microscopical examination thereof;" second, that Ordinance No. 87, as amended, is unconstitutional, and the property of the appellant under said ordinance is destroyed without due process of law. On both of these propositions the appellee joins issue, and contends, firstly, that no other examination of the milk in question, before its destruction under said ordinance, was required, but by the Lactometer test, to ascertain the specific gravity of the milk, as prescribed in section 2 of said ordinance ; and secondly, that the ordinance as amended, is constitutional, and

a legitimate exercise of the power delegated to the appellee, both under its general powers to preserve the health of the city as well as by the express power conferred by the Act of 1894, ch. 53.

The Lactometer is the recognized instrument by which the specific gravity of milk is ascertained. The bill in effect admits that the milk of the appellant under the Lactometer test was impure, but claims in addition to this test that there should have been the "chemical or microscopical examination" to ascertain the solids. The express language of the ordinance makes the milk impure if it fails to come up to any of the requirements of the standard in section 2, that is, if its specific gravity alone is below the standard prescribed, irrespective of the per centum of the total solids or butter facts the milk may contain (both of which per centums can only be ascertained by chemical or microscopical examination), the milk is impure and can be destroyed by the inspector. If the specific gravity is in conformity with standard and the per centum of total solids below the standard, the milk is impure. The chemical and microscopical examination is prescribed in the ordinance as an additional test to ascertain the impurity of the milk, if the specific gravity is up to standard, but there is no line or word in the ordinance requiring this to be made before the condemnation and destruction of the milk which does not come up to the specific gravity test, as ascertained by the Lactometer.

The appellee had full and ample authority under its general powers to pass and enforce the ordinance in question. *Harrison v. Mayor & C. C. of Balto.*, Gill, 277; *Boehm v. Mayor, &c.*, 61 Md. 263; *Town of Summerville v. Pressley*, 11 S. E. Rep. 545; S. Car. 15, *Am. & Eng. Ency. of Law*, 1173; 1 *Dillon on Mun. Corp.* secs. 144, 145, 369.

A milk standard can be established by law. The unbroken line of authorities establishes this proposition. It may be arbitrary and, in fact, an improper standard, yet when the Legislature or its agent, the municipality, under the police power, fixes the standard, it is binding on all persons

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and not open to judicial inquiry. *People v. Cipperley*, 101 N. Y. 634; *State v. Campbell*, 64 N. H. 404; *Com. v. Waite*, 11 Allen, 264; *Blazier v. Miller*, 10 Hun. 435.

The destroying of impure milk, without prior judicial inquiry, is not the taking or destruction of property without due process of law. *Barbier v. Connolly*, 113 U. S. 31; *Hiag v. Crowley*, 113 U. S. 703; *Eichenlaub v. City of St. Joseph*, 21 S. W. Rep. 8. In this case the Court draws the correct distinction between the forfeiture of unoffending property and the destruction of the offending thing. In the former case it is not permissible without a prior judicial inquiry; in the latter case, it is lawful to at once abate the thing which causes hurt to the public. The validity of the ordinance rests on the immediate and imminent danger to life and health. *Blazier v. Miller*, 10 Hun. 435.

To the same effect are the following cases—all of which emphatically declare that no prior judicial inquiry is necessary before destroying the offending thing. The only requirement to give validity to the ordinance or law is that it relates to a matter within the scope of the police power either as exercised by the State or delegated to a municipality. *State v. Topeka*, 36 Kan. 83; *Blair v. Forehand*, 100 Mass. 140; *Morey v. Brown*, 42 N. H. 373; *Wolf v. Chal-ter*, 31 Conn. 121; *Leach v. Elwood*, 3 Bradwell 454; *Stal-ler v. Sheridan*, 27 Ind. 494; *Jenkins v. Ballantyne*, 30 Pac. Rep. 760 (Utah); *Mugler v. Kansas*, 123 U. S. 623; *New ark v. Hart*, 50 N. J. Law, 308.

It must be remembered that this destruction of the impure milk, as provided by the amendment, is no part of the *punishment* of the owner of the impure milk. The sole punishment is the fine imposed by section 6 of the ordinance, "*of not less than twenty dollars nor more than fifty dollars for each offense.*" Nor is the destruction of the impure milk a *forfeiture* of property. It is simply the destruction of the *offending* thing, which is caught on its way to the homes of families, carrying death and disease in its wake, and it is arrested and destroyed.

There can be no doubt of the right of the Legislature to pronounce, under its police power, certain things, or certain acts, nuisances in themselves, and it may provide that these things may be regulated by ordinances or by laws of the respective cities or towns, or controlled by their authorities. It may determine when that which is otherwise property shall cease to be such if kept against law. The Board of Health is invested, by the Legislature, with the power to make regulation necessary for the health and safety of the inhabitants, extending to all persons, goods and effects arriving in vessels. *Train v. Boston Disinfecting Co.*, 144 Mass. 523; see also *Guillotte v. New Orleans*, 12 La. An. 432; *Trageser v. Gray*, 73 Md. 257; *Boehm v. Mayor, etc.*, 61 Md. 264; *Heise v. Town Council*, 6 Rich. Law, 404. Cases like *In re O'Keefe*, 19 N. Y. sup. 677; *Philips v. Allen*, 41 Pa. St. 481; *Dawes v. Hightstown*, 45 N. J. L. 503, have no analogy to the case at bar.

ROBINSON, C. J., delivered the opinion of the Court.

In addition to the general powers conferred on the Mayor and City Council by sec. 378, Art. 4, Code Public Local Laws, to pass ordinances to preserve the health of the city, the Act of 1894, chap. 53, expressly authorizes them to provide by ordinance for the proper inspection of milk and all other food products offered for sale in the city, and to make such regulations in regard to the sale of the same as they may deem necessary to protect the public health.

It was in pursuance of these powers that Ordinance No. 87, now in question, was passed. This ordinance makes it unlawful for any person to sell or offer for sale "any impure, adulterated, sophisticated or unwholesome milk or other food products." It further provides that only pure, unadulterated, unsophisticated and wholesome milk shall be sold, and that such article shall be understood to be the natural product of healthy cows, and which has not been deprived of any part of its cream, and to which no additional liquid or solid preservative has been added,

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and which, at a temperature of 60° F., shall have a specific gravity of not less than 1.029 and not less than twelve per cent. of total solids, and not less than three per cent. of butter fats. And all milk kept or offered for sale in the city, which shall not come up to the standard thus prescribed, shall be considered impure, adulterated, sophisticated or unwholesome.

And the ordinance also provides that the term adulterated shall be construed to mean any artificial addition to normal constituents, and the term sophisticated to mean the substitution of one product for another, or any abstraction of or artificial change in the normal constituents, and the term unwholesome to mean deleterious to health, etc. And it further provides for the appointment of a competent analytical chemist, who shall make such chemical and microscopical examinations as may be required under the ordinance, and for the appointment also of three inspectors of food.

And section 6, as amended, provides, "And milk or food products in the possession of the person or persons so violating, disobeying, refusing or neglecting to comply with the provisions of this ordinance may be confiscated and destroyed by the inspector examining the same."

The bill of complaint alleges that the appellant is a dairyman, and conducts a retail business for the sale of milk, and that in the pursuit of his business he daily serves milk from his wagons to his customers at their homes in the city.

That on or about the 16th July, 1894, Patrick R. Welsh, inspector, and William P. Tonry, analyst, on the public highway, took certain milk, the property of the appellant, "and without making any chemical or microscopical examination thereof, and without due process of law, poured the said milk out upon the streets and down the gutters of the city, thereby wasting and destroying the said milk."

The bill also alleges that the said Patrick R. Welsh and William P. Tonry under the direction of the Board of Health and under color of Ordinance 87 as amended, publicly declared their intention to destroy the milk of the appel-



lant and others, which, after an inspection by them, made by means of a certain mechanical instrument known as a "Lactometer," and by a test taken with "Litmus" paper, they shall conclude not to be of the standard prescribed by the ordinance. The bill further alleges that the ordinance is an undue and excessive exercise of the corporation's legislative powers as conferred by law, and that sect. 6 as amended, as absolutely void and no effect.

Besides the general relief, the bill prays that an injunction be issued restraining the Mayor and City Council and all the other defendants from taking and destroying, without chemical or microscopical examination first made, and without due process of law first had, any milk or other dairy product, the property of the complainant, &c.

We cannot agree with the counsel for the appellee, that a Court of Equity has no jurisdiction to restrain the appellee in the enforcement of the ordinance in question, even though it may be conceded to be *invalid* and that its execution would *affect injuriously the rights of the appellant* and others. In *Page's case*, 34 Md. 558, and in *Holland's case*, 11 Md. 186, and in other cases, we have said that "where an ordinance is void and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may and properly ought to go into a Court of Equity and have the execution of the ordinance stayed by injunction."

An *action at law*, it is true, would not lie against the city authorities to recover *damages* for the wrongful acts of its officers in the execution of the ordinance, and for the reason that the police power to pass such ordinances, is delegated by the State to be exercised not for the benefit or in the interest of the city *in its corporate capacity*, but for the *public good*. *Boehm's case*, 61 Md. 259. There is a broad distinction, however, between an action at law against the city authorities to recover damages for the wrongful acts of its officers, and the power of a Court of Equity to restrain the enforcement of an ordinance admitted to be

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invalid, and the execution of which affects injuriously private rights.

Nor can there be any question as to the power of the appellee to provide by ordinance for the inspection of milk offered for sale within its corporate limits, and to forbid the sale of any milk which does not come up to the standard or test prescribed by the ordinance. And the real question it seems to us under the demurrer, is whether it has the power to direct that milk which is found upon inspection not to come up to the standard, as thus prescribed, *shall be destroyed?*

What is termed the police power has been the subject of a good deal of consideration by both the Federal and State Courts, and all agree that it is a difficult matter to define the limits within which it is to be exercised. Every well organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, "*Salus populi suprema lex,*" and the constitutional guarantees for the security of private rights relied on by the appellant have never been understood as interfering with the power of the State to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. "Property of every kind," says Mr. Justice Story, "is held subject to those general regulations which are necessary for the common good and general welfare. And the Legislature has the power to define the mode and manner in which every one may use his property." 2 vol. *Story Const.*

And in the late case of *Mugler v. Kansas*, 123 U. S. 62, after considering the constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law, the Supreme Court says these

limitations "have never been construed as being incompatible with the principle equally vital, because so essential to the peace and safety, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

To justify such interference with private rights, its exercise must have for its *immediate object the promotion of the public good*, and, so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals. At the same time the emergency may be so great, and the danger to be averted so imminent, that private rights must yield to the paramount safety of the public, and to await, in such cases, the delay necessarily incident to ordinary judicial inquiry, in the determination of private rights, would defeat altogether the object and purposes for which the exercise of this salutary power was invoked. Whatever injury or inconvenience one may suffer in such cases, he is, in the eye of the law, compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public.

The use of milk as an article of food enters largely, as we all know, in the daily consumption of every household, and there is no more fruitful source of disease than the use of adulterated and unwholesome milk. And if the appellant's contention be right, that the question whether or not milk, which is daily offered for sale in every part of a large and populous city, comes up to the standard prescribed by the ordinance, must be determined by the ordinary process of judicial investigation or by chemical analysis, it would be impossible to prevent the danger to the public health necessarily resulting from impure and unwholesome milk. And it is absolutely necessary, therefore, that the appellee should have the power to provide for its inspection by *proper means and instruments*, and if upon such inspection it shall be found not to come up to the standard prescribed by the

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ordinance, to direct that *the offending thing shall be destroyed.*

The exercise of such a power is, we think, fully sustained both on principle and authority. In *Blazer v. Müller*, 10 Hun. 432, an ordinance, like the one now before us, authorized the inspector to destroy milk offered for sale which, upon inspection, was found to be below the proper standard, was sustained on the ground that the destruction of the offending thing was necessary to prevent the imminent danger to life and health, which would result from the use of impure milk. And in *Mugler v. Kansas*, to which we have heretofore referred, Mr. Justice Harlan says: "The exercise of the police power by the destruction of property, which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."

It is in the exercise of this power that quarantine laws, which not only interfere with private rights, but with the liberty of persons, are passed; and also, laws which provide for the destruction of infected clothing to prevent the spread of contagious diseases. And as to the extent and the summary manner in which this power may be exercised to protect the public health, we may refer to *Boehm's case*, 61 Md. 264; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, and *Newark v. Hart*, 50, N. J. L. 308.

The Act of 1894, authorizing the appellee to provide for the inspection of milk, and to make such regulations in regard to the same as it may deem necessary, also authorizes the appellee to provide, by a fine of not more than one hundred dollars, for the punishment of all persons violating such regulations. The amount of the fine was left to the discretion of the appellee; provided, however, it was not to exceed one hundred dollars. The ordinance in question provided a fine of not more than fifty dollars, as a punishment for persons violating its provisions, and as the amount

of the fine, not to exceed, however, one hundred dollars, was left to its discretion, there can be no objection to the ordinance on this ground.

*Order affirmed.*

(Decided December 18th, 1894.)

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ELIHU E. JACKSON AND OTHERS vs. SALLIE M. JACKSON.

*Proof of Marriage and Legitimacy—General Reputation—Instructions to the Jury—Evidence—Depositions.*

Marriage may be proved by general reputation, cohabitation and acknowledgement in all cases, except actions for criminal conversation and prosecutions for bigamy.

The declarations of deceased parents are competent evidence to prove the legitimacy of their children, as well as to prove their marriage at a particular time and place, but evidence that the man did not tell an intimate friend that he was married or had a child, is not admissible.

Where the evidence as to the general reputation concerning the marriage of the parties in question is conflicting, it is competent for the jury to find the reputation according to the evidence of the plaintiff, but it is error in such case to instruct the jury that upon the evidence the law presumes that the parties were lawfully married, and the burden of proof is upon the defendant to show that they were not. Every fact stated in the prayer might have been found to be true, and yet the jury might properly have refused to sustain the marriage, because there was evidence qualifying these facts and tending to throw discredit and suspicion upon the cohabitation between the parties.

If a marriage can be justly inferred from the facts, then the presumption is that it was lawfully contracted wherever it may have taken place, and it will make no difference if it be shown that by the law of the State where it was contracted, the same ceremony is not requisite which is prescribed by the law of this State. But the Court cannot take judicial notice of the law of another State, and no instruction to the jury concerning the same should be granted in the absence of evidence as to that law.

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Syllabus.

Where it is attempted to prove a marriage by a general reputation, cohabitation and acknowledgment, the instructions on the one side ought to put clearly before the jury the facts in evidence from which they would be justified in finding the marriage, and on the other side the facts should be stated which would justify them in refusing to so find.

A prayer asserting that, under the circumstances therein stated, the jury could not find a marriage from reputation, is erroneous in a case where there is other evidence to establish the marriage besides that bearing on reputation.

A prayer asserting that if the connection between the parties was illicit in its beginning, it will be presumed to continue to be of the same character, and that this presumption can only be overcome and the marriage established by other evidence than cohabitation, is erroneous because it does not specify what other evidence was required.

Where it is sought to prove a marriage by general reputation, the character of the woman for chastity, the circumstances under which the parties lived together, their conduct and declarations after their separation, the manner in which they were treated by their families and the community, may be taken into consideration by the jury. And evidence that the woman, after the separation, lived in a disorderly and disreputable manner is admissible.

A medical witness is competent to testify whether a certain woman had ever been delivered of a child before the one at whose delivery he was her attendant physician.

Declarations of a person, not shown by evidence *aliunde* to be related to a certain man, are not admissible to establish the relationship of a third person to him.

A witness cannot be asked whether, in his opinion, certain persons were married.

Where one party to a cause gives more than five days notice to the attorney of the other party that the testimony of non-resident witnesses will be taken at a designated time and place before a notary public, and the attorney of the other party attends the taking of the evidence, the depositions are admissible under Code, Art. 35, sec. 16.

Appeal from the Circuit Court for Dorchester County.

The appellee filed a petition in the Orphans' Court of Dorchester County, alleging that she was the only child of Richard Watson Jackson, late of said county, deceased, and asking for the grant of letters of administration on his per-

sonal estate. The appellants answered, denying that the petitioner was the lawful child of the said Jackson, who, they alleged, was never married, and died without lawful issue, and asked that administration be granted to one of his brothers or sisters, as next of kin. Upon the petition of the appellee the following issue was sent by the said Orphans' Court to the Circuit Court for trial: "Is Sallie Jackson, the petitioner in this cause, the only lawful child of Richard Watson Jackson, intestate, deceased, whose estate is sought to be administered upon?" At the trial ten bills of exceptions were taken to the rulings of the Circuit Court, (LLOYD and HOLLAND, JJ.) The second exception was taken to the testimony of a medical witness who had attended Mary Morris, the mother of the appellee, before and after her alleged marriage, to the effect that she had never been delivered of a child before the one spoken of by the witness. The fourth exception was taken to the refusal of the Court to allow a witness to be asked, on cross-examination, if he had ever heard the reputation of the plaintiff's mother for chastity questioned or doubted before the time she lived with Watson Jackson as his wife. The other exceptions to the evidence are stated in the opinion of the Court.

The plaintiff offered the following prayers:

*Plaintiff's First Prayer.*—If the jury find from the evidence that R. Watson Jackson, during the period from the early part of the year 1870 to the early part of the year 1872, visited Mary Morris at her mother's house in Philadelphia, and that sometime between the first of February and the first of April, 1872, the said R. Watson Jackson and Mary Morris left the city of Philadelphia for a short period of time, and afterward returned to the house of said Mary Morris in said city, and stated to her parents and relatives that they had been married in Chester, Pa.; and if they further find, that from and after that time the said Mary Morris assumed the name of Mary Jackson, and that from and after June, 1872, or thereabout, the said Watson Jack-

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son and Mary Jackson lived together and cohabited as man and wife at 1014 Vine street, Philadelphia, and elsewhere in said city, until the spring of 1873, and that during said period of time, to-wit, on or about the first of January, 1873, and while they were thus cohabiting together, a child was born to the said Mary Jackson, and that the said Watson Jackson engaged Mordicai Price, a practising physician, to attend Mary Jackson as his wife during her confinement and the birth of said child, and paid the said physician for his services, and that said child was afterward named Sallie Jackson, and is the plaintiff in this case; and if the jury further find, that the said Watson Jackson and Mary Jackson, together with the infant child aforesaid, in the spring of 1873, moved to Salisbury, Maryland, rented a house, and there resided together, ostensibly as man and wife, until the spring or summer of 1874, demeaning themselves toward each other as such, and were recognized in the community of Salisbury as man and wife, and held themselves out to the world as such, and that they or either of them stated to one or more citizens of Salisbury that they were married in Chester, Pa., then the law presumes that they were lawfully married, and the burden of proof is upon the defendants to show, by a preponderance of evidence, that the said Watson and Mary were never lawfully married.

*Plaintiff's Second Prayer.*—If the jury find the facts set forth in plaintiff's first prayer, then they are instructed that said marriage is legally presumed to have been duly and lawfully contracted according to the law of the place in which they may find that said marriage occurred, and if they find that such marriage occurred in the State of Pennsylvania, then the validity of such marriage is recognized in Maryland, even though the jury may not find that any religious ceremony was performed at such marriage, nor any license obtained therefor.

The defendants offered the ten following prayers:

*Defendants' First Prayer.*—The defendants pray the Court to instruct the jury that it is incumbent on the plaintiff to



prove to the satisfaction of the jury a valid marriage between Richard Watson Jackson and the plaintiff's mother, and unless they shall so believe, their verdict must be for the defendants.

*Defendants' Second Prayer.*—The defendants pray the Court to instruct the jury, that unless they shall believe from the evidence that there was a valid marriage between Richard Watson Jackson and the plaintiff's mother, their verdict must be for the defendants, even though they may believe that the plaintiff is the daughter of Richard Watson Jackson.

*Defendants' Third Prayer.*—The defendants pray the Court to instruct the jury, that cohabitation and reputation of marriage do not constitute or make a contract of marriage, but is only evidence from which the jury may presume a contract of marriage, if not rebutted or overcome by other evidence, but for the jury to find a valid marriage between Richard Watson Jackson and the plaintiff's mother on the evidence of cohabitation and reputation, the reputation of their marriage must be general and uniform and not divided; and if they shall believe from the evidence in the case, that the reputation of marriage between them was not general, but was divided, then they cannot find a valid marriage from such reputation.

*Defendants' Fourth Prayer.*—If the jury shall believe from the evidence, that the connection between Richard Watson Jackson and the plaintiff's mother was illicit or without marriage in its commencement, it will be presumed to continue to be of the same character, and in order to overcome that presumption it is necessary to adduce other evidence than cohabitation to establish their marriage.

*Defendants' Fifth Prayer.*—To infer or presume a valid marriage between the plaintiff's mother and Richard Watson Jackson from reputation of marriage between them, that presumption must be founded on a general reputation and not divided or singular opinion; and if the jury shall believe from the evidence, that the reputation of said marri-

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age was not general, but was divided, then they cannot presume a valid marriage therefrom.

*Defendants' Sixth Prayer.*—That in determining the value or weight of the declarations of marriage or not between the said R. Watson Jackson and the plaintiff's mother, as made by them or either of them, the jury must consider all the circumstances under which they were made.

*Defendants' Seventh Prayer.*—That if the jury shall believe from the evidence that R. Watson Jackson and the plaintiff's mother did say or declare that they were married in Chester, Pennsylvania, and did cohabit in Pennsylvania, and did there hold themselves out as married, then these facts and all of them of themselves do not constitute or make a valid marriage under the laws of Pennsylvania; and that in determining the weight or value of such declarations, cohabitation and reputation as evidence, the jury should take in consideration the circumstances under which they were made.

*Defendants' Eighth Prayer.*—The defendants pray the Court to instruct the jury, that while the jury may infer or presume a marriage from cohabitation, general reputation, declarations and acknowledgements of the parties, yet these facts do not constitute or make a valid marriage, and, that to presume or infer a marriage from such evidence, it should be clear of suspicion, based on a general and not a divided reputation; and if the jury shall believe from the evidence that R. Watson Jackson and the plaintiff's mother did live together as man and wife, and did so hold themselves out to the world and so declare, and there was repute of their marriage in the communities where they lived, yet, in determining or finding from this evidence whether or not they were married, they should take into consideration the reputation of the plaintiff's mother for chastity, the length of time they so lived together and held themselves out as man and wife, the manner and circumstances of their coming together as husband and wife and so living, the length of time they lived apart, their conduct, habits and circumstances

since their separation, the declarations of them or either of them during their separation, and the manner in which they were received and treated by their respective families and the society of the community in which they lived during the time of their cohabitation and the years of their separation.

*Defendants' Ninth Prayer.*—The defendants pray the Court to instruct the jury, that if there is no evidence of a valid marriage between the plaintiff's mother and R. Watson Jackson, except the evidence of cohabitation between them, their acknowledgements and the reputation of the marriage; and that if the jury shall believe that the plaintiff has undertaken to prove a valid marriage between the said R. Watson Jackson and the plaintiff's mother at Chester, Pennsylvania, in the year 1872, and according to the laws of Pennsylvania, it is incumbent upon her to show that such marriage was in all respects in conformity to the laws of Pennsylvania at the time and place alleged by the plaintiff; and if the jury believe that they have failed to prove the fact of marriage at the time and place alleged by them, then they cannot rely upon cohabitation and reputation of marriage to raise a presumption of marriage at some other time or place than that offered in evidence to them, if they believe they have offered any evidence of the time and place of that marriage. And the jury cannot infer or presume a marriage at the time or place so attempted to be proved, except by testimony that is clear and explicit and general and supported by other circumstances, nor by reputation for marriage that is divided and not general.

*Defendants' Tenth Prayer.*—The defendants pray the Court to instruct the jury that there is no sufficient evidence in this case of the fact of a valid marriage contract between Richard Watson Jackson and the plaintiff's mother, made in the spring of 1872, at Chester, Penn.

The Court granted the plaintiff's prayers, and granted the defendants' sixth prayer, as offered, and granted the first, second, fourth and fifth, with the following amendments by the Court:

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The Court inserted in the first prayer, after the words "to the satisfaction of the jury," the words "facts from which," and after the words "a valid marriage," the words "may be presumed," and amended the second prayer by inserting after the words "believe from the evidence," "facts from which," and after the words "a valid marriage" inserted the words "may be presumed." The Court amended the defendants' fourth prayer by inserting after the words "from reputation," the word "alone." The Court amended the defendants' fifth prayer by inserting after the words "from reputation," the word "alone;" and the Court rejected all the other prayers of the defendants; to which action of the Court in granting the plaintiff's prayers, and in the amending of the defendants' first, second, fourth and fifth prayers, and the rejection of the third, seventh, eighth, ninth and tenth, the defendants excepted, and the verdict and judgment being for the plaintiff, this appeal was taken.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*James E. Ellegood* (with whom was *John R. Pattison* on the brief), for the appellants.

The first exception arises on the admission of the depositions taken in Philadelphia. This testimony was taken under the Act of 1888, 1 Code, Art. 35, sec. 16. On the call of the docket on April 23, this case was set for trial by consent of all parties for May 8th. On April 27th notice was given of the plaintiff's (appellee's) intention to take this testimony on the fourth of May, which was taken in Philadelphia, returned and filed May 7th (Record, page 12.) We submit that the whole proceedings were *irregular*, and that the appellants were taken by *surprise*. Sec. 16 declares that depositions taken under it "shall be treated in all respects as if taken under a commission regularly issued by said Court, and shall be subject to like exceptions as testimony taken under commission." Therefore, all the

particularity is required in this "mode" as if taken under a commission. The "notice of not less than five days" takes the place of a commission, but in all other respects the modes are identical.

First, we ask if this statute is to be so construed as to take a party by surprise, allowing depositions taken and filed one day before trial under the statutory requirement of five days notice? If so, what becomes of the rule and practice requiring depositions to lie in Court, and "to be published in the same manner and form as has heretofore been the practice in the case of a commission from a Court of Equity." Code, Sec. 15, Art. 35. 2 Poe's Pleading, in speaking of "open commissions" and oral examinations, declares "that it is absolutely indispensable that *due and reasonable notice* be given of the time and place, etc." This is such a just principle and practice that no authority need be cited.

The second ground of irregularity and surprise is, that there were no interrogatories filed or served on the appellants. While a notice of time and place is not necessary in the taking of depositions under a commission, "actual or constructive notice should be given to the opposite party *in time* to enable him to exhibit cross-interrogatories before the commission is sent out." *B. & O. R. R. Co. v. State*, 60 Md. 458. Supplemental interrogatories were ruled out in *Mathews v. Dare*, 20 Md. 268; *Parker v. Sedgwick*, 5 Gill, 320. It was impossible for the appellants to know the nature of the testimony to be taken and to prepare cross-interrogatories, or rebuttal testimony. The depositions were taken Friday, May 4th, and immediately sent for filing, and filed on Monday, the seventh. Nor is the appearance of the appellants' attorney a waiver of any rights, as he appeared specially and noted objections to the mode and procedure, and for the special purpose of reserving their rights. There was no waiver, expressed or implied, of any rights. In the next place, the notice is irregular, as "It is a notice that the plaintiff will attend *in person or by attorney*." No

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such right is given under the Code. A party cannot compel the opposite party to attend in person. "The depositions shall be treated in all respects as if taken under a commission regularly issued." This practice requires interrogatories to be filed. Notice by filing interrogatories is a prerequisite. 60 Md. 458. The notice under the statute supersedes the commission only, not the interrogatories. The second and third exceptions must fall with the first.

On the other exceptions and the prayers, the counsel relied on: *Boone v. Purnell*, 28 Md. 607; *Redgrave v. Redgrave*, 38 Md. 95; *Barnum's case*, 42 Md. 251; *Crawford v. Blackburn*, 17 Md. 53; *Denison v. Denison*, 35 Md. 361; *Dartmouth College case*, 4 Wheat. 518; *Wade v. Kalbfleisch*, 58 N. Y. 284; *Stewart & Carey on Husband and Wife*, 15; *Com. v. Stump*, 48 Pa. 53; 1 *Bishop on Marriage and Divorce*, sec. 266; *Jones v. Jones*, 48 Md. 403; *Dysart Peccage case*, L. R. 6 Ap. Cas. 514; *Yardley's appeal*, 75 Pa. St. 207; *Brinkley v. Brinkley*, 50 N. Y. 199; *White v. White*, 82 Cal. 127; *Cunningham v. Cnnningham*, 2 Dow. P. C. 482; *Lapsley v. Grierson*, 8 Ct. Sess. (2 series) 61; *Clayton v. Wardwell*, 4 N. Y. 234; *Badger v. Badger*, 88 N. Y. 551.

*E. Stanley Toadvin* (with whom were *Geo. M. Bell* and *Alonzo L. Miles*, on the brief), for the appellee, cited *Williams v. Banks*, 5 Md. 199; *Waters v. Waters*, 35 Md. 546; *Walker v. Schindel*, 58 Md. 370; *Davis v. State*, 38 Md. 37; *Barnum's case*, 42 Md. 304; *Boone v. Purnell*, 28 Md. 607; *Redgrave v. Redgrave*, 37 Md. 93; *Richard v. Behm*, 73 Pa. St. 140; *Jones v. Jones*, 45 Md. 144; *Fornhill v. Murry*, 1 Bland, 482; *Copes v. Copes*, 7 Gill, 247; *Sellman v. Brown*, 8 G. & J. 54; *Jones v. Jones*, 48 Md. 400; *Hanan v. State*, 63 Md. 128; *Guardians of Poor v. Nathan*, 2 Brewster, 149; 2 *Poe's Pldg.*, sec. 303, *Wilson v. Merryman*, 38 Md. 330.

BRYAN, J., delivered the opinion of the Court.

An issue was sent from the Orphans' Court of Dorchester County, to the Circuit Court, in these words: "Is Sallie Jackson, the petitioner in this cause, the only lawful child

of Richard Watson Jackson, intestate, deceased, whose estate is sought to be administered upon." And it was ordered by the Orphans' Court, that upon the trial of the issue, Sallie Jackson should be plaintiff, and the decedent's brothers and his sisters and their husbands should be defendants. At the trial before the jury the plaintiff introduced a good deal of testimony tending to prove the marriage of her parents and her legitimacy. It was in evidence that Richard Watson Jackson was residing in Philadelphia, and that he and Mary Morris, who was residing there in February or March, eighteen hundred and seventy-two, went to Chester to be married, and after they returned, both of them stated that they were married. It was also testified that they acknowledged each other as husband and wife; that they cohabited together and were generally reputed to be married. It is not certain, from the testimony, at what time their cohabitation commenced or when the child was born.

Evidence was also given of the declarations of Jackson and the reputed wife, who are both dead, that Sallie Jackson was their legitimate daughter; also of declarations to the same purport made by the mother of the reputed wife. On the other hand, the evidence in behalf of the defendants tended to prove declarations by Watson Jackson that he was not the father of Sallie Jackson, and declarations, both by him and the mother, that they were never married; that the reputation of the mother for chastity was bad, both before and during her cohabitation with Watson Jackson; that they were not generally reputed to be married, and that they separated sometime in eighteen hundred and seventy-four, and never lived together afterwards. It appears from the proceedings in the Orphans' Court, that Watson Jackson died in October, eighteen hundred and ninety-three. It does not devolve upon us to settle the disputed questions of fact arising on the evidence; it was for the jury to determine the credibility of the testimony, and to draw all legitimate inferences from it. We are limited to a review of the questions of law decided by the Circuit Court as they

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are presented in the bills of exception. These are ten in number, and were all taken by the defendants. They have appealed, as the verdict was in favor of the plaintiff.

By the law of Maryland a valid marriage cannot exist unless it is celebrated by a religious ceremony. It is not required that the marriage should be proved by witnesses who were present at the time ; but such facts must be proved, as in the contemplation of the law will justify the inference that a religious ceremony has been performed. The declarations of deceased parents are admitted as evidence to prove the legitimacy of their children. *Craufurd v. Blackburn*, 17 Md. 49. It was said in the *Berkley Peerage case* : " If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy until impeached, and indeed it amounts to a daily assertion that the son is legitimate." This assertion of the legitimacy of the son involves and implies the precedent condition that the parents were lawfully married. In *Copes v. Pearce*, 7 Gill, 247, the evidence of the legitimacy of the female petitioner (Mrs. Pearce) consisted of the declarations of her reputed father, Giles Copes, deceased, that he had been married to her mother, and that she was his daughter ; together with the fact that she lived with him as his daughter before her marriage, and proof that she was called " Sister Betsy," and treated and recognized as a sister by the sons of a woman whom he married after the death of her mother. The Court said : " The declarations of Giles Copes are full and explicit with regard to his marriage and the birth of Elizabeth, the appellee ; and his whole subsequent conduct, and the course and bearing of the brothers, is an entire corroboration of them. Nothing short of actual proof of marriage and birth, by witnesses actually present, could be more convincing and conclusive." Marriage may also be proved by general reputation. *Boone v. Purnell*, 28 Md. 607. In most cases it is proved by general reputation, cohabitation and acknowledgment. This species of evidence is admissible in all cases, except actions to recover damages for adultery



and indictments for bigamy. *Taylor on Evidence*, sec. 517 ; *Redgrave v. Redgrave*, 38 Md. 97. The probative force of such evidence will vary according to the circumstances with which it is connected. For the sake of illustration let us state a case. Suppose it is shown that a man and a woman lived together as husband and wife for many years, and continued this connection until it was dissolved by the death of one of them ; that their deportment on all occasions was that of married people ; that they acknowledged each other as husband and wife ; that they were received in society as such, and were generally so reputed and esteemed, and that to all external appearance their lives were upright, moral and irreproachable. This body of facts would lead any impartial mind irresistibly to the conclusion that they were married. The suggestion that they had been living in sin and dishonor would be justly rejected as irrational and scandalous. The necessary inference then would be that their union originated under the circumstances which the law required to make it valid. In *Vincent's appeal*, 60 Pennsylvania State Reports, 240, there were unusual and irregular features attending the cohabitation between a man and a woman ; but the facts of the case were of a peculiar character, and the Court thought that the pure fame and spotless reputation of the woman made it highly improbable that she would have consented to a lascivious connection, and they gave great weight to her exemplary conduct, in considering circumstances which otherwise would have been fatally suspicious. But men and women frequently live together in honorable matrimony who do not possess the virtues of the couple in the supposed case. Therefore, it cannot be held that all of the facts which we have enumerated are absolutely necessary to prove marriage. They would prove it in a very complete and satisfactory manner. Circumstances less favorable would also establish it, but not so conclusively. The lower the standard of rectitude of the parties, the less improbable would it be that they would lead a life of shame. And so we may say that the weaker the gen-

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eral reputation of marriage, the less would be its effect in producing the conviction that it really existed. And matters of suspicion, if not satisfactorily explained, would in proportion to their gravity weaken the proposed inference, or might defeat it altogether.

It is believed that the general principles governing this branch of the law are well settled by the authorities. But there is sometimes considerable difficulty in applying them to combinations of facts. The plaintiff's first prayer accumulates a number of facts relating to the acknowledgment of marriage of the parties and to cohabitation and reputation; with regard to reputation it required the jury to find that they "were recognized in the community of Salisbury as man and wife, and held themselves out to the world as such, and that they or either of them stated to one or more citizens of Salisbury that they were married in Chester, Pa." Upon the finding of these facts it asserts that "the law presumes that they were lawfully married, and the burden of proof is upon the defendants to show by a preponderance of evidence, that the said Watson and Mary were never lawfully married." It does not require the jury to find that there was a general reputation of their marriage. They were recognized in the community of Salisbury by some persons as husband and wife; there was also evidence that there was a general reputation in the community in favor of the marriage; on the other hand, there was evidence that they had never been recognized as married by the family of the man, and a witness testified "that there was a divided opinion as to their being married; that the general opinion of those with whom he talked was that they were not married." General reputation is of great importance in determining the nature of the cohabitation, and the question ought to have been submitted to the jury. It would have been competent for the jury to find the general reputation according to the evidence in behalf of the plaintiff, or they might have found according to the evidence on the other side. But it is necessary that the reputation

from which marriage is to be inferred should be general and not divided or singular. *Barnum v. Barnum*, 42 Md. 297 ; *Jones v. Jones*, 48 Md. 391. The conclusion of the prayer is stated too strongly. The facts mentioned in the prayer, with the addition of general reputation, would have justified the jury in finding the marriage if they believed that it existed, but it was an error to say that these facts made the conclusion of law imperative in favor of a lawful marriage, and imposed on the defendants the burden of proving the negative. Every fact stated in the prayer might have been found to be true, and yet the jury might properly have refused to sustain the marriage, because there was evidence qualifying these facts, and tending to throw discredit and suspicion on the cohabitation between the parties. Mary Fuller testified that during the time of the cohabitation the plaintiff's mother stated that she was not married ; and there was also evidence that her reputation for chastity was bad, both before the cohabitation and during its continuance. There was also evidence that Watson Jackson, during the time of the cohabitation, said that the child was not his. It was also testified that before they separated he stated in the woman's presence " that they were never married, and she knew it," and that the woman made no reply. If the character of the woman for chastity was bad, one of the elements would be wanting which give weight to cohabitation as one of the proofs of marriage, because it would be evident that moral restraints would not prevent her from living in concubinage. And if both man and woman stated that they were not married, these declarations would be grave impeachments of the connection between them. If they stated the truth the inference of marriage would, of course, be impossible. The cohabitation important to be considered in cases of this kind, is that which in its character and circumstances is consistent with the matrimonial union. The jury must decide on the credibility of the testimony, and it was their province to decide the question of marriage according to the inferences, which, in their judgment, ought properly to be drawn from the evidence.

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The plaintiff's second prayer is in these words: "If the jury find the facts set forth in plaintiff's first prayer, then they are instructed that said marriage is legally presumed to have been duly and lawfully contracted according to the law of the place in which they may find that said marriage occurred; and if they find that such marriage occurred in the State of Pennsylvania, then the validity of such marriage is recognized in Maryland, even though the jury may not find that any religious ceremony was performed at such marriage, nor any license obtained therefor."

This prayer is founded on the first, and must fall with it. A general principle is correctly stated in it. If the marriage is justly inferred from the facts, then the presumption is that it was lawfully contracted wherever it may have taken place, and it will make no difference, if it be shown that by the law of the State where it was contracted the same ceremony is not required which is prescribed in this State. *Redgrave v. Redgrave*, 38 Md. 97. We, however, cannot take judicial notice of the law of Pennsylvania; if it was desired that it should have any influence in this case, it ought to have been proved in evidence. *Gardner v. Lewis*, 7 Gill, 378.

The first prayer on the part of the defendants, was as follows: "The defendants pray the Court to instruct the jury that it is incumbent on the plaintiff to prove to the satisfaction of the jury a valid marriage between Richard Watson Jackson and the plaintiff's mother, and unless they shall so believe, their verdict must be for the defendants." The inquiry was whether there was a valid marriage, and this prayer presents the question fairly to the jury. It was correct as an abstract proposition. But as an instruction applicable to the case, it was defective, because it did not inform the jury what was necessary to constitute a valid marriage. It left them to their own conjectures to determine what circumstances were necessary to its validity. The Court made an amendment which left the jury to find "facts from which a valid marriage may be presumed," but did not inform them what facts were required for the purpose.

In a case like the present, where it is sought to deduce a marriage from facts and circumstances, the instructions on one side ought to set clearly before the jury the facts in evidence, from which they would be justified in finding the marriage; and on the other side the facts and circumstances should be stated which would justify them in refusing so to find. The first prayer for the defendant in *Boone v. Purnell*, 28 Md. 618, is a good example of such an instruction.

The second prayer for the defendants and the Court's amendment of it are liable to the same objections as the first. The defendants' third prayer was correct as an abstract proposition. It asserted that under the circumstances stated in the prayer, the jury could not find a marriage from reputation. But there was a good deal of other evidence for the plaintiff besides that bearing on reputation. It would perplex and embarrass trials very much to permit such a mode of practice. It is not right to instruct a jury that they cannot find a verdict from a portion of the evidence, and leave them in the dark as to what they ought to find from other portions competent to sustain a verdict. It would be an easy matter in every contested case to select some portion of the testimony which, standing alone, would not authorize a verdict for the plaintiff; but it is his right that all of the competent evidence in his favor should be considered by the jury. We do not question the right of a party to segregate a portion of the evidence, and obtain by a prayer the opinion of the Court upon its effect, as sanctioned by *Whiteford v. Buckmeyer*, 1 Gill, 127, and many other cases. But this right must be exercised in harmony with the other rules of practice, and is necessarily limited by their operation. The fourth and fifth prayers are liable to similar objections, and the amendments made by the Court do not materially change them. Upon the supposition that the connection between Watson Jackson and the plaintiff's mother was illicit at its commencement, it was incumbent on the plaintiff to show a subsequent marriage between them. *Barnum v. Barnum*, 42 Md. 297; although this may be

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shown by indirect proof. *Jones v. Jones*, 45 Md. 156. But this is not the proposition of the fourth prayer. It asserts that under such circumstances, other evidence than cohabitation was necessary to establish their marriage, but does not specify what other evidence was required. In point of fact there was much more evidence; so the prayer gave no definite information to the jury. The sixth prayer is not in question. The seventh prayer seeks an instruction in respect to the law of Pennsylvania. There is no evidence in the record of the law of Pennsylvania, and we have already said that we cannot take judicial notice of it. The eighth prayer asserts that the jury should take into consideration "the reputation of the plaintiff's mother for chastity, the length of time they so lived together and held themselves out as man and wife, the manner and circumstances of their coming together as husband and wife and so living, the length of time they lived apart, their conduct, habits and circumstances since their separation, the declarations of them or either of them during their separation, and the manner in which they were received and treated by their respective families, and the society of the community in which they lived during the time of their cohabitation and the years of their separation." All these matters tended to show the nature of the connection between the parties, and were important in enabling the jury to determine whether the cohabitation was pure and innocent, according to the proprieties of married life, or whether it was licentious. If the appearances and circumstances indicated virtue and respectability, they would be favorable to the inference of marriage; but if they bore the marks of incontinence and depravity, the tendency would be to the contrary. It rested with the jury to decide the question. The ninth prayer was properly rejected. The declarations of Jackson and the plaintiff's mother, that they were married at Chester, were competent evidence to go to the jury to prove the marriage. For this reason the tenth prayer was also properly rejected. The Court granted the two prayers of the plaintiff, and re-

jected all of the defendant's in the form in which they were offered, except the sixth ; but granted the first, second, fourth and fifth with amendments.

We will now consider the exceptions to the rulings on the evidence. The first exception is to the admission of depositions taken in Philadelphia in behalf of the plaintiff. They were taken in accordance with the requirements of Article 35, section 16 of the Code, and after the notice therein prescribed had been given. The defendant's counsel was present at the taking of the testimony and cross-examined the witnesses. We see no objection to the depositions. The second exception was to the testimony of Dr. Price, given in answer to the eleventh interrogatory. The matter of inquiry was a question of medical knowledge, and the witness, a physician, was competent to testify as an expert. The third exception was to the following testimony given by Lettie A. Morris: "One thing I have thought of since I have been in this room. Why should he come forward and want this child? He made the proposition to her grandmother to take her and educate her." She was speaking of a proposition which the mother of plaintiff's mother (who died two years ago) said had been made by Jackson. It is urged that this declaration is admissible to prove family relationship. It is maintained that Jackson's offer to provide for the child was evidence of an acknowledgment of her on his part as his legitimate daughter, and that this declaration of the child's grandmother tends to prove the repute in the family of her legitimacy. Waiving all question about the remoteness of this declaration from the point in issue, we may state that the effort is to establish a relationship to Jackson, and this cannot be done by the declarations of a person who is not shown by evidence *aliunde* to be related to him. This point was distinctly adjudged in *Blackburn v. Crawford*, 3 Wallace (S. C.) Reports, 188. The evidence ought to have been rejected. The question asked of the witness in the fourth exception seems to have been disallowed, because it was leading. In the fifth bill of excep-

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tions the defendnts proposed to ask a witness his opinion whether the parties were married. This was clearly incompetent. In the sixth the witness was asked whether he and his wife had recognized Jackson and the plaintiff's mother as husband and wife. Family repute and general reputation are evidence, but the individual opinions and recognition of two persons are not admissible. They were not even connected with the family. In the seventh exception a witness for defendant testified that she lived in a house about three yards distant from the one occupied by Jackson and the plaintiff's mother, and that "she heard whistling at night about the house, and saw men in the yard about the house at night, and that she would meet them sometimes as she was going to the well for water; that the mother of the plaintiff had told her that she had a child in Philadelphia before she was married, and that she had disposed of it by putting it in the water pipes, and that it came before its time; that she never saw a man go in the house; but that on one occasion at night she saw a man come to the door, and plaintiff's mother met him at the door." She was then asked this question by defendants' counsel: "State under what circumstances and conditions you saw the party whom you speak of go to the door, and state what you saw on that occasion?" The counsel for defendants stated, "that they proposed to show the conduct of the plaintiff's mother, and the suspicious character of the inmates of the house, and proposed to follow it up by frequent visits of men to the premises at night under suspicious circumstances." But on objection by the plaintiff the Court overruled the question. If the defendants could prove that the house was kept in a disorderly and disreputable manner, it would have a tendency to show that the intercourse between these parties was not of a virtuous kind. Similar testimony was tendered in the eighth exception, and for the same reason it ought to have been admitted. In the ninth exception the defendants offered to prove by a witness that he had never heard Jackson say that he was married or that he had a child.



This witness had already testified that he was very intimate with Jackson, and had talked with him on the subject of marriage. If Jackson had said that he had never been married, it would have been admissible in evidence, but we cannot see how his failure to make any statement on the subject can be evidence. The Court ruled against the defendants on all the questions of evidence which we have been considering. There was error in granting the plaintiff's two prayers and in refusing the defendants' eighth prayer, and in the rulings in the third, seventh and eighth exceptions to evidence.

*Rulings reversed and cause remanded  
for a new trial.*

(Decided December 18th, 1894.)

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ANDREW J. WILLISON *vs.* FIRST NATIONAL  
BANK OF FROSTBURG ET AL.

*Insolvency—Unlawful Preferences—Attachment—Assignments.*

Under Code, Art. 47, a transfer of property or payment of money to a creditor by merchants or traders then insolvent or in contemplation of insolvency, with intent to give such creditor a preference, is an act of insolvency rendering them liable to be adjudicated insolvents.

No title in the property so transferred passes to the creditor, but the same will be vested in the trustee in insolvency; and the trustee is also entitled to recover from such creditor the money so paid him by the insolvents as an illegal preference.

Where such payment or transfer of property has been made by insolvent merchants, with intent to create a preference, and a general creditor issues attachments on original process, causing the same to be laid in the hands of the parties receiving the preferences, then, if the said merchants are subsequently adjudicated insolvents, within the time prescribed by law, the trustee in insolvency will take such property or money, subject to the inchoate lien of the attaching creditor.

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Syllabus.

Where such payment has been made by an insolvent trader, the fact that the creditor receiving the same did not know of the insolvency or of the intended preference, does not avail to prevent the transfer from being set aside under Code, Art. 47, sec. 22.

Where a firm, being insolvent, sells its stock of goods, and thereupon returns to the purchaser a part of the purchase money to be applied by him to the payment of certain promissory notes of the firm, on which he was an endorser, an unlawful preference is created to that extent.

Where a merchant or trader is guilty of acts of insolvency, and creates preferences forbidden by statute, an assignment for the benefit of creditors, subsequently executed by him, has no effect against the trustee in insolvency.

Appeal from the Circuit Court for Allegany County.

The case is stated in the opinion of the Court. A petition in insolvency was filed by the appellee, the First National Bank of Frostburg, against Wm. Parker and Josiah Parker, partners, trading as Wm. Parker & Brother, and certain creditors alleged to have obtained unlawful preferences from them. At the hearing the plaintiff offered the following prayers, the case being tried before the Court (HOFFMAN, J.), without a jury:

*Plaintiff's First Prayer.*—If the Court shall find that the defendants, William Parker and Josiah Parker, were, on or about the 13th day of January, 1894, partners, trading and doing business as William Parker & Bro., and were merchants doing such business, and that at such time said defendants were insolvent or in contemplation of insolvency, and that on or about said date said William Parker and Josiah Parker, as such partners, made a transfer of their stock of goods in their store at Vale Summit, to one Walter T. Parker, for the consideration of \$960, and that said firm was largely indebted to said Walter T. Parker at that time, to-wit, in the sum of \$1,600.00; and shall further find that said transfer was made to said Walter Parker in order to pay part of said debt, and was made with the intent on the part of said Wm. Parker & Bro. to prefer the debt of said Walter Parker against said firm to the extent of \$960, and for no other consideration, then such fact amounts to an act

of insolvency on the part of said Wm. Parker & Bro., and renders them liable to be adjudicated insolvents by the order of this Court.

*Plaintiff's Second Prayer.*—If the Court shall find the facts set out in the first prayer, and shall further find that on or about the 2nd day of February, 1894, said Wm. Parker & Bro. sold their stock of goods at Eckart, for the sum of \$2,555.00, and thereupon at once paid in full to certain of their creditors their debts against said firm, as follows : To Frederick Mitchel, \$65.00 ; James R. Stewart, \$125 ; Oliver Barnard, \$75, and to his daughter-in-law, ——— Parker, the sum of \$300, and that said defendants paid their said debts when they were insolvent or in contemplation of insolvency, and with the intent to give them a preference in the payment of their debts over the other creditors of said defendants, then each and all said payments were acts of insolvency on the part of said defendants, and render them liable to be adjudicated insolvents by the order of this Court.

*Plaintiff's Third Prayer.*—If the Court shall find the facts set out in the first prayer, and shall adjudge said defendants insolvent, then said transfer of the stock of goods at Vale Summit, to Walter T. Parker, is void and passed no title to him for the same, and should be declared void by the order of this Court.

*Plaintiff's Fourth Prayer.*—If the Court shall find the facts set out in the first and second prayers, and shall adjudicate said defendants insolvents, and shall further find that on the 21st day of February, 1894, the defendants sold and transferred their stock of goods at Eckhart to the defendant, Andrew J. Willison, for the sum of \$2,555.00, and that at that time said Willison was the first endorser on three notes of said Wm. Parker & Bro., one for \$200, which was due and was protested on said 21st day of February, ——— ; one for \$155, due about March 17, and one for \$200, due about Mch. 20th, 1894, and shall further find that said Willison paid for said stock by his check to said Parker & Bro. for said \$2,555, and that immediately upon

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receipt of said check said Parker & Bro. gave their check to said Willison for \$555.00, covering the amount of said three notes endorsed by said Willison, with instructions to said Willison to pay off said notes, and that said Parker & Bro. were at that time insolvent or in contemplation of insolvency, and that said Parker & Bro. gave said \$555.00 to said Willison to relieve him from his liability on said notes on their account, and with intent to prefer said Willison in the claim he would have against said Parker & Bro. on account of said endorsements, and that said Willison paid off said notes, then such facts amount to an illegal preference to said Willison to that amount, and that no title was vested in him to said \$555.00, and that said payment to him of said money was a preference, which, under the insolvent law, should be set aside and declared void, and the title to said fund (subject to the rights of the attaching creditors herein) vested in such insolvent trustees as shall be appointed by this Court.

*Plaintiff's Fifth Prayer.*—If the Court shall find the facts set out in first and second prayers, and shall adjudicate said defendants insolvents; and shall further find that said defendant, Wm. Parker, on or about the 13th day of January, 1894, made a mortgage upon his real estate to the defendant, Jacob S. Jamesson, for \$3,500, and that said Parker and Jamesson agreed that \$100.00 of the same should be applied by said Jamesson in payment of an indebtedness of said Parker to said Jamesson for that amount, being part of a much larger sum borrowed by said Parker from said Jamesson long before said time, and still due and owing, and that said Jamesson did so retain said \$100.00, and did so apply it to his said debt as far as it would go; and shall further find that at said time said Parker was insolvent or in contemplation of insolvency, and that he paid said \$100.00 to said Jamesson, with interest, to make a preference to him in the payment of his said debt to that amount, then that said payment is void and vested no title in said Jamesson to said \$100, and that the title to the same against said James-

son will vest in such insolvent trustees as shall be appointed by this Court.

*Plaintiff's Sixth Prayer.*—That if the Court shall find the facts set out in the first and second prayers, and shall adjudicate said defendants insolvent; and shall further find, that on the 23rd day of February, 1894, said William Parker executed the deed of trust offered in evidence, and that he was then insolvent or in contemplation of insolvency, then said deed of trust, under the insolvent law of Maryland, is void and of no effect, and vests no title to the property set out in said deed in the trustee named therein, as against such insolvent trustees as shall be appointed by this Court in this case.

*Plaintiff's Seventh Prayer.*—If the Court shall find that on or about the 13th of January, 1894, the defendants were insolvent and largely in debt to various persons to the amount of ten or twelve thousand dollars, and had no property with which to pay the same, except the stock of store goods at Eckart, worth twenty-five hundred and fifty-five dollars (\$2,555.00), and the stock of goods at Vale Summit, worth nine hundred and sixty dollars (\$960.00), and certain real estate at Eckart, owned by William Parker, worth less than five thousand dollars (\$5,000.00), on which J. S. Jamesson already had a mortgage for fifteen hundred dollars (\$1,500.00); and shall further find that said William Parker, on said thirteenth day of January, 1894, executed a mortgage on said real estate to said Jamesson for thirty-five hundred dollars (\$3,500.00), and received said loan from Jamesson in cash, and that he told said Jamesson, when he obtained said loan, that he was in financial difficulties and in debt and wanted to borrow said money to meet said debts and assist him in his financial difficulties, and that said Parker, shortly after he received said money, did not use the same in paying his creditors with a large portion of it, but deposited out of this State in a bank in Piedmont (which bank was not his usual bank of deposit or business), thirty-one hundred dollars (\$3,100.00) of said money, in the

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name and to the credit of the wife of said William Parker, and that said Parker admitted in his evidence, in this case, that his object in placing said money in said bank in his wife's name, was to repay her a loan of one thousand dollars (\$1,000.00) she had made to him some years ago, and to secure her a home, and that he thought she could secure her home by paying off said mortgage with said money, and that on the 21st day of February, 1894, said defendants sold their stock of goods at Eckhart for twenty-five hundred and fifty-five dollars (\$2,555.00) cash, and paid off certain of their debts in full with about fourteen hundred dollars (\$1,400.00) of said money, but that William Parker could not tell what they had done with six hundred dollars (\$600.00) of said money, and that of said twenty-five hundred and fifty-five dollars (\$2,555.00) he had turned over about four hundred and seventy dollars (\$470.00) to A. A. Wilson, the trustee named in his deed of trust to Wilson; and that on the 22nd day of February, 1894, the First National Bank of Frostburg, one of the plaintiffs, issued the attachment in evidence, charging in the affidavit for the same that said William Parker and Josiah Parker had assigned, disposed of or concealed, or were about to assign, dispose of or conceal, some of their property, with intent to defraud their creditors; then from said facts the Court may further find as a fact, that at the time of the issuing of said attachment said William Parker and Josiah Parker had assigned, disposed of or concealed, or were about to assign, dispose of or conceal their property or some portion thereof, with intent to defraud their creditors.

*Plaintiff's Eighth Prayer.*—That if the Court shall find the facts stated in the plaintiff's first and second prayers, and shall adjudicate said defendants insolvent, and shall, under the seventh prayer submitted on behalf of the First National Bank of Frostburg, find that William Parker and Josiah Parker, partners, trading as William Parker & Bro., on the 22nd day of February, 1894, when said attachment was issued, had assigned, disposed of or concealed their

property or some portion thereof, with intent to defraud their creditors, and that said attachment was on said day laid in the hands of one Andrew J. Willison, and on the stock of goods in the store at Vale Summit, and that on the 21st day of February, 1894, said William Parker & Brother gave said Willison a check for five hundred and fifty-five dollars (\$555.00), money of said defendants, with directions to use the same in paying off three notes to that amount of the defendants, on which said Willison was endorser, and that two of said notes were then owned and held by the Citizens' National Bank of Frostburg, one for two hundred dollars (\$200.00), due March 20th, 1894, and one for one hundred and fifty-five dollars (\$155.00), due March 15th, 1894, and that the third note for two hundred dollars (\$200.00), was owned and held by the Second National Bank of Cumberland, Md., was due on February 21st, 1894, and protested on that day; and shall further find that said Willison deposited said five hundred and fifty-five dollars (\$555.00) to his own credit in the Citizens' National Bank of Frostburg, on said 21st day of February, 1894, and at said time told the cashier of said bank to charge up said two notes to his account, and that when said two notes, amounting to three hundred and fifty-five dollars (\$355.00), fell due on March 17th and March 20th, they were charged up to his account on the days said notes fell due, respectively, but not before, and that on the 22nd day of February, 1894, said Willison sent his check to the Second National Bank of Cumberland for two hundred dollars (\$200.00) to pay said protested note, which check reached said bank on the 23rd day of February, 1894, and was returned by said bank for collection to the Citizens' National Bank, and paid by it on the 24th day of February, 1894, and not before; and if the Court shall find the facts set out in plaintiff's fourth prayer, and shall adjudicate said five hundred and fifty-five dollars (\$555.00) a preference under the insolvent law, and shall declare the said payment to said Willison void, and set the same aside, and require said Wil-

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lison to turn over the same to the insolvent trustee, then said attachment became a lien upon said five hundred and fifty-five dollars (\$555.00) in the hands of said Willison, and became a lien on the stock of goods at Vale Summit, subject to the right of the insolvent trustee to recover said money from Willison, and to reduce said stock of goods to money, and said attaching claim is entitled to be distributed to in the settlement of said insolvent estate, as a lien on said fund prior to the general creditors of said defendants.

The defendant, Willison, offered the following prayers :

*Willison's First Prayer.*—A. J. Willison, by his attorney, prays the Court to declare as a matter of law, that if the Court, sitting as a jury, shall find from the evidence that said Andrew J. Willison, on the 21st day of February, 1894, purchased from William Parker and Brother, the defendants, their stock of goods, wares and merchandise, together with the good will of the business at their store at Eckhart mines, at and for the sum of \$2,555.00, and that said purchase was made in good faith on the part of said Willison, and the whole amount of the said purchase money was *bona fide* paid by him (said Willison) to the said defendants at the time said sale was made, then said sale was lawful, valid and binding, even though the Court, sitting as a jury, shall find from the evidence that said William Parker and Brother were insolvent at the time said sale was made; and even though the Court, sitting as a jury, shall further find that said William Parker and Brother used a part of said purchase money for the payment of certain notes mentioned in evidence, upon which said Willison was endorser.

*Willison's Second Prayer.*—Andrew J. Willison, by his attorney, prays the Court to declare as a matter of law, that if the Court, sitting as a jury, shall find the facts set out in said Willison's first prayer; and shall further find, that immediately after the sale therein mentioned, and before the writ issued in the attachment proceedings mentioned in the evidence had been served upon said Willison, said William Parker and Brother gave to said Willison their check for



\$555.00, with instructions to apply the proceeds thereof to the payment of a certain note mentioned in evidence, upon which said Willison was the endorser, and that said Willison accepted the same with the understanding and agreement that the same was to be so applied by him, and the proceeds of said check were not more than sufficient for the payment of said notes, then that such proceeds were not subject to the attachment served upon said Willison as aforesaid.

*Willison's Third Prayer.*—And further prays the Court to declare, as a matter of law, that if the Court, sitting as a jury, shall find the facts set out in his first and second prayers, and shall further find that the notes to which the proceeds of said check were to be applied were as follows, to-wit: One note in the Second National Bank of Cumberland for \$200.00, and two in the Citizens' National Bank of Frostburg—one for \$155.00, and the other for \$200.00; and shall further find that said Willison, immediately upon receipt of said check of Parker Brothers, took and deposited the same to his own account in the Citizens' National Bank of Frostburg, and then and there instructed the cashier thereof to charge his (Willison's) account with the said two notes of said Parker Brothers, and that said cashier then and there agreed so to do, and afterwards did so charge the same, and that he (Willison) also immediately drew his own check on his said account in said Citizens' National Bank for the sum of \$202.07, payable to Daniel Annan, cashier of the Second National Bank of Cumberland, and at once sent the same by mail to said bank in Cumberland, with instructions to apply the same to the payment of said note of Parker Brothers in said bank and protest costs thereon; and shall further find that the writ of attachment mentioned in the evidence was served on said Willison after he had applied the proceeds of said check of Parker Brothers in the manner above set out, then that the proceeds of said check were not legally subject to said attachment in Willison's hands, even though the Court, as a jury as aforesaid, shall

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further find that as a matter of fact the said cashier of the said Citizens' National Bank of Frostburg did not charge said notes in his bank to said Willison's account until the maturity of said notes, and that said notes did not mature until after the service upon said Willison of the said writ of attachment.

*Willison's Fourth Prayer.*—And if the Court, sitting as a jury, shall find the facts set out in the first, second and third prayers of the said Willison, that then the Court has no power to pass any order in this case requiring said Willison to return said sum of \$555.00, or any part thereof, to said Parker and Brothers, or to any trustee or trustees for the creditors of the said Parker and Brothers.

The Court granted the eight prayers of the plaintiff and the first prayer of the defendant Willison, and rejected his second, third and fourth prayers; to which ruling of the Court in granting the plaintiff's eight prayers, and in rejecting his second, third and fourth prayers, the defendant, Willison, excepted.

The order of the Court below by which the defendants, Parker and Brother, were adjudicated insolvents, further adjudged that "the payment by the defendants of the sum of five hundred and fifty-five dollars to Andrew J. Willison, and the transfer of the stock of store goods at Vale Summit by the defendants to Walter T. Parker, and the payment by the defendant, William Parker, of one hundred dollars to Jacob S. Jamesson, were illegal preferences under the insolvent laws of Maryland, and that each and all of the same be and they are annulled and set aside, and said preliminary trustee, or the permanent trustee or trustees who shall hereafter be elected by the creditors, shall proceed to collect from said Willison and from said Jamesson said sums of money, and shall take possession of said stock of goods of the defendant at Vale Summit, and hold the same as part of the estates of said insolvent firm and said insolvents, and said Willison and said Jamesson are hereby directed to pay over said sums of money to said trustees.

" And it is further adjudged and ordered, that the deed of trust dated the 23rd day of February, 1894, made by William Parker to Austin A. Wilson, trustees, be and the same is hereby set aside, and the said Austin A. Wilson is hereby directed to turn over to said preliminary trustees all moneys or property of said insolvent firm, or of either of the members of the same, which has come to his hands.

" And it is further adjudged and ordered, that at the time of the issuing and laying of the attachment of said First National Bank of Frostburg against said defendants offered in evidence, they had assigned or disposed of, and were about to assign or dispose of their property or some portion thereof with intent to defraud their creditors, and that said attachment be and the same is hereby sustained, and that the plaintiff in said attachment case, by the laying of the same in the hands of said Willison and upon the stock of store goods at Vale Summit, acquired a lien upon said fund and upon said stock of goods, and that the preliminary trustees or the permanent trustee or trustees hereafter elected in this case be and they are hereby directed to keep a separate account of said money when collected from said Willison and of the proceeds of said stock of goods (all of which shall pass into their hands subject to said lien of said attachment), to the end that in the distribution of said estate regard may be had to the right of priority in such distribution of said attaching creditor."

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, PAGE and ROBERTS, JJ.

*Clayton Purnell*, for the appellant, cited: *B. & O. R. R. Co. v. Wheeler*, 18 Md. 378; *Poe v. St. Mary's College*, 4 Gill, 503; *Troxall v. Applegarth*, 24 Md. 183.

*Robert R. Henderson* and *Benj. A. Richmond*, for the appellee, cited: *Castleburg v. Wheeler*, 68 Md. 277; *Bowland v. Wilson*, 71 Md. 313; *Thomas v. Brown*, 67 Md. 515;

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*Baker v. Kunkel*, 70 Md. 394; *Buschman v. Hanna*, 72 Md. 1; *Brown v. Swart*, 69 Md. 324; *Cross v. Hecker*, 75 Md. 576; *Troxall v. Applegarth*, 24 Md. 182; *Moses v. Franklin Bank*, 34 Md. 574.

ROBERTS, J., delivered the opinion of the Court.

Whilst the parties defendant in this case are numerous, but one has appealed from the judgment of the Court below, and now seeks to have his legal rights determined by this Court.

The record shows that one of the appellees, the First National Bank of Frostburg, on February 23rd, 1894, filed its petition in insolvency against William Parker and Josiah Parker, who were then and for many years prior thereto had been partners, trading as merchants, under the firm name of William Parker and Brother, at Eckhart, and also at Vale Summit, in Allegany County, and against the appellants and others, who are alleged to have obtained fraudulent preferences in their dealings with said firm. The proof shows that at the time of filing said petition, said firm was indebted to the petitioners in the aggregate sum of \$1,545.00, as evidenced by five several promissory notes then overdue and unpaid, which had been endorsed to the petitioner by said firm, and been duly protested for non-payment. That being insolvent or in contemplation of insolvency and unable to pay their current obligations as the same accrued due, William Parker, one of said firm, executed and delivered to his brother-in-law, Jamesson, a deed of mortgage dated 23rd of February, 1894, and filed for record on May 4th, following, by which he conveyed to him all his real estate for the alleged consideration of \$3,500; \$100 of said sum was retained by said Jamesson, with the concurrence of said Parker, to pay to that extent a larger indebtedness due said Jamesson. William Parker, at the time of the execution and delivery of

said mortgage, informed Jamesson that he was in financial difficulties and wanted the money to pay his debts, which, however, he did not do, but went out of the State to deposit \$3,100 of said loan in a bank in an adjoining State, *in the name of his wife*. Nearly all of the several sums of money obtained by said firm and the individual members thereof, from the sales of their personal and real property and from Jamesson's mortgage, have been applied by them in violation of the provisions of the insolvent laws of the State, as giving unlawful preferences and hindering, delaying and defrauding the creditors of said firm. The said firm being indebted as aforesaid, and also indebted to sundry persons in various sums of money, which they were unable to pay, on the 21st of February, 1894, assigned and conveyed to the appellant all of its stock of goods in the store at Eckhart, for the sum of \$2,555.00. Of this sum, when paid over, there was immediately returned by William Parker to the appellant the sum of \$555.00, with the understanding that he was to apply the same in payment of three several notes of said firm, on which he was the endorser; which was accordingly done. In December, 1893, said firm being indebted to Walter T. Parker, a son of Josiah Parker, the nominal member of said firm, in the sum of sixteen hundred dollars, sold to said Walter T., who was the clerk of said firm, their stock of goods in the store at Vale Summit, for the sum of \$960.00, for the purpose and with the intent on the part of said firm to prefer the debt of said purchaser to the extent of \$960.00.

The record shows that after filing said petition and while said firm and the members thereof were insolvent, and after committing the several acts of insolvency hereinafter stated, William Parker, one of said firm, executed a deed of trust of all his property and estate, including his interest in said co-partnership, to Austin A. Wilson, for the benefit of his creditors; which deed is dated February 23rd, 1894, but was not filed for record until the 4th day of May following. This deed upon its face recites that the grantor therein, William

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Parker, is insolvent, and in the answer of said firm to said petition they admit that the said William Parker and Josiah Parker "*were partners in name only.*" On the 22nd day of February, 1894, the First National Bank of Frostburg, one of the appellees, issued an attachment on original process, alleging that said firm had assigned, disposed of or concealed their property, or some part thereof, with intent to defraud their creditors, and the same was laid in the hands of the several parties who had received from said firm unlawful preferences as aforesaid, and did also attach the interest of said firm and of the members thereof in certain real estate mentioned in the sheriff's return.

The petition prays for subpoenas against the debtors, the trustee and the preferred creditors, but none but the debtors, the appellant and Jamesson answered. At the trial below, the parties waived a jury trial, and submitted the issues raised by the petition and answers to the Court for adjudication on the law and facts, without the intervention of a jury.

The appellant answered said petition and denied all knowledge of the several fraudulent preferences charged therein against the other defendants, and says that he admits the purchase by him from said firm of the stock of goods in the store at Eckhart, but denies that said firm was then insolvent, or in contemplation of insolvency, or that said sale to him was made with intent to delay, hinder and defraud creditors of said firm. He also admits that about the same time he purchased said stock of goods, and after he had paid the whole amount—\$2,555.00—of the purchase money due thereon to said firm, the said William Parker gave to him the sum of \$555.00, and requested him to apply the same in payment of certain notes upon which he was endorser, and that he so applied said money.

Upon the proof offered at the hearing, the Court adjudged the said partners, both as individuals and as partners, insolvents, and appointed preliminary trustees; and further adjudged and decreed, "That the payment by

the defendants of the sum of five hundred and fifty-five dollars to Andrew J. Willison, the appellant, and the transfer of the stock of the store goods at Vale Summit by the defendants to Walter T. Parker, and the payment by the defendant, William Parker, of one hundred dollars to Jacob S. Jamesson, were illegal preferences under the insolvent laws of Maryland; and that each and all of the same be and they are annulled and set aside, and said preliminary trustees or the permanent trustee or trustees, who shall be hereafter elected by the creditors, shall proceed to collect from said Willison and from said Jamesson said sums of money, and shall take possession of said stock of goods of the defendant at Vale Summit, and hold the same as part of the estates, of said insolvent firm and said insolvents, and said Willison and said Jamesson are hereby directed to pay over said sums of money to said trustees."

The only exception in the record is to the action of the Court below, in granting the plaintiff's prayers, and in rejecting the second, third and fourth prayers of the appellant, who alone has appealed from the judgment of the Court below. It therefore becomes our duty to inquire in what respect, if any, the Court below has committed error by its action on the prayers.

We do not see that the plaintiff's third, fifth and sixth prayers even remotely affect the rights of the appellant, and have not been referred to in the argument before this Court, we shall therefore treat the objection as having been waived. We will, however, remark that if it were necessary to pass upon them, we should say that they correctly declare the law applicable to the facts therein stated. No exceptions have been filed to any of the plaintiff's prayers for want of evidence to sustain them, and after the careful examination which we have given to the evidence in the cause, we unhesitatingly say that the testimony set out in the record conclusively shows that every material allegation charged against the defendants is satisfactorily established.

The plaintiff's first and second prayers set forth the facts

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requisite to bring the case within the requirements of the Code, Art. 47, sec. 14, 22, 23, and correctly announce the law, which should govern in cases of this character, as decided by this Court in *Castleberg v. Wheeler*, 68 Md. 277, 279, and in *Bowland v. Wilson*, 71 Md. 313. The fourth prayer, referring to the first and second prayers for the facts therein stated, adds the further facts connected with appellant's purchase of the store goods at Eckhart, and the immediate return by Parker to him of \$555.00 to pay the notes, which he had indorsed for Parker, the same having been done by Parker when insolvent or in contemplation of insolvency, and with intent thereby to prefer and protect the appellant, then concludes that such payment was an illegal preference to the appellant, which should be set aside, and he be required to refund said sum to the insolvent trustees. This construction is fully sustained by the very terms of the statute *supra*, as well by the decision of this Court in *Brown v. Smart*, 69 Md. 331-32.

We have nothing whatever to do with the conclusion on the facts reached by the Court below, sitting as a jury, but we do not hesitate to say that the record contains most ample proof of a deliberate effort on the part of Parker & Bro. to shield certain creditors in violation of the provisions of the insolvent laws, and with intent to hinder, delay or defraud the general creditors outside the list of the favored few. It is scarcely necessary to give separate consideration to the plaintiff's other prayers, as the principle pertaining to the first and second is in greater or less degree applicable to the remaining prayers.

The First National Bank of Frostburg, before filing its petition, issued an attachment on original process, laying it as hereinbefore stated, the legal effect of which is ascertained and correctly declared by the terms of the seventh and eighth prayers, and is sustained by the decisions of this Court in *Thomas v. Brown and Lowndes*, 67 Md. 515; *Buschman v. Hanna*, 72 Md. 5; *Dumler v. Bergman*, 29 Atl. R. 826. (To be reported in 78 Md.)



The fact that Willison had no knowledge of the insolvency of Parker & Bro., or that they intended the payment to him as a preference, cannot avail to protect him under the provisions of the Code, Art. 47, sec. 22, which says that a merchant or trader, "when insolvent or in contemplation of insolvency, executes a deed or conveyance giving preferences, creates a lien, making any unlawful preferences as therein stated, or *otherwise gives such preferences*, &c., shall be deemed to have committed an act of insolvency, and by section 32, it is provided that in such cases the creditors can file a petition praying for the adjudication of insolvency, and pending the determination of the application for such adjudication, and pending any question of the validity of any preference or transfer of any property with intent to hinder, &c., or to give an unlawful preference to any creditor, *indorser* or *surety*, the Court shall issue a restraining order, &c., and when such adjudication has been made and when the Court shall have appointed a preliminary trustee, all the estate and property of the debtor shall be divested out of the debtor and devolve on the trustee, and by section 14 any such lien or preference shall be *void*."

This Court, construing the meaning and effect of the statutes in *Castleberg v. Wheeler*, 68 Md. 279, *supra*, says, "The second of these prayers is based upon the theory that though the defendant was actually insolvent at the time of making payments and giving preferences, yet, if he honestly believed he would be *able to go on in business*, and with such belief he paid the debts without a design to give a preference, such payments were not fraudulent as against the insolvent law, and therefore the verdict should be for him on the *third issue*. But the statute makes no such provision as is made the basis of this prayer. The defendant might have believed himself able to go on in business, with the indulgence of his creditors, though he might have known himself to be insolvent, and he might be entirely honest in believing that he would be able to relieve himself of embarrassment by future successes. But that condition

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of things would not deprive the creditors of the right to proceed under the statute. If the party proceeded against belongs to any of the classes of persons mentioned in section 143 of the statute, and being insolvent or in contemplation of insolvency (which means inability to pay debts, when due, in the ordinary course of business), make the transfer or create the lien, which operates to give the preferences, he subjects himself to the provisions of the statute."

The appellant, by the granting of his first prayer, obtained quite as favorable construction of the law as he was entitled to receive, if not more so. The second, third and fourth prayers of the appellant were rejected, and we think the Court committed no error in thus disposing of them. The statute to which reference has been heretofore made, and the authorities heretofore referred to, sufficiently dispose of these prayers. After having exhausted their ingenuity in devising schemes by which they could escape the provisions of the insolvent law of the State, and having failed in accomplishing their purposes, the debtors resorted to a deed of trust, which was executed on the 23rd of February, 1894, but which was withheld from record until the 4th of May following. But this could avail nothing, since they had, prior to the execution of the deed, been guilty of acts of insolvency prohibited by the law. *Riley v. Carter*, 76 Md. 611; *Pfaff v. Pragg*, 29 Atl. R. 824 (to be reported in 78 Md.)

There are questions in the record which we do not deem it necessary for us further to discuss, but from what we have said, it follows that the judgment of the Court below must be affirmed.

*Judgment affirmed with costs.*

(Decided December 18th, 1894.)

CALEDONIAN INSURANCE COMPANY OF SCOT-  
LAND *vs.* JULIUS TRAUB AND JACOB TRAUB,  
PARTNERS, ETC.

*Fire Insurance—Appraisal of Loss—Waiver of Preliminary Proof—  
Demand—Instructions on Segregated Facts—Pleading.*

In an action on a written contract, it is admissible in evidence if set forth in the declaration according to its legal effect.

Where a policy of fire insurance provided that in the event of a loss and a disagreement between the insured and the company as to the amount of the loss, the question should be submitted to appraisers, and a submission and award have been made in pursuance of the provision, then the same are admissible in evidence, and a witness should be allowed to identify them.

In such case, if the appraisers have properly performed their duties, the award is binding upon both parties.

A jury is authorized to find that the insurer waived the preliminary proof of loss required by the policy; if they find that the defendant company was notified of the loss, and that its agents visited the premises, took possession of the property, retaining it for several days, and subsequently offered to pay plaintiff the amount of an award, and denied its liability on other grounds than the absence of proof of loss.

A party has a right to ask for an instruction upon segregated portions of the evidence, but the conclusions arrived at must be consistent with the truth of all the other facts in evidence.

Therefore, in an action on a policy of fire insurance where there is evidence from which the jury may infer that the defendant had waived the preliminary proofs of loss of the character required by the policy, a prayer instructing the jury that the plaintiff cannot recover unless such preliminary proof was furnished, is erroneous.

And a prayer in such case instructing the jury that the plaintiff cannot recover if he did not furnish the preliminary proof of loss required by the policy, unless the jury find that the defendant waived compliance with the policy, is erroneous, because it submits a question of law to the jury. Waiver in this case, depending upon parol evidence of circumstances, was a matter to be determined by the jury under the instructions of the Court as to what circumstances are sufficient to constitute waiver.

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Where the property was insured in four companies, and in an action against one it was agreed that, if the jury found for the plaintiff, the verdict should be for the full amount of the loss, which would be apportioned among the companies, and judgment entered against each company for its proportionate loss, then a prayer instructing the jury that the plaintiff can only recover such proportion of the loss that the policy sued on bears to the whole amount of the insurance on the property, is properly rejected.

When a contract of insurance has been made, followed by loss of the goods by fire, and waiver of preliminary proof by the insurer, then a right of action accrues, and no demand of payment is necessary.

Appeal from the Circuit Court for Carroll County.

This was an action on a policy of fire insurance, covering a stock of goods contained in a brick building in Union Bridge, Maryland. The jury returned a verdict for the plaintiffs, assessing their damages at \$4,200; and, under the agreement of the parties referred to in the opinion of the Court, judgment was entered against this defendant for \$1,020. The provisions of the policy relating to the estimate of a loss by appraisers, are as follows:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy." \* \* \*

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this

company each selecting one, and the two so chosen shall first select a competent and disinterested umpire ; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss ; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

“ This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part, relating to the appraisal or to any examination herein provided for ; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.”

The agreement for submission to appraisers, signed by the parties, provided that the persons therein named “ shall appraise, estimate and determine the actual cash sound value at the time of fire, and the loss and damage by fire to the property belonging to the said J. Traub & Bro., as specified below, which appraisement or estimate by them or any two of them in writing, as to the actual cash sound value and amount of loss and damage by fire shall be final and binding on both parties as far as regards such appraisement ; it being understood that this appraisement is without reference to any other questions or matter of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash sound value and loss or damage by fire to property covered by policies,” etc.

The award of the appraisers determined that the actual sound cash value of the property insured was \$2,145.23, and the damage thereon was \$1,043.08.

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The plaintiffs' prayer is set forth in the opinion of the Court. The defendant offered the following prayers :

*Defendant's First Prayer.*—That unless the jury shall find that the plaintiffs, within sixty days after the 23rd day of July, in the year 1893, gave notice of the loss by fire of the goods and merchandise mentioned in the policy of insurance sued on in this action, and did render to the defendant's company a statement signed and sworn to by the plaintiffs, stating their knowledge as to the time and origin of the fire, the interest of the plaintiffs and all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance, whether valid or not, covering any of said property, and a copy of all descriptions and schedules in all said policies, then the verdict of the jury must be for the defendant.

*Defendant's Second Prayer.*—That the burden is on the plaintiffs to prove that they furnished to the defendant the preliminary proof of their loss required by the conditions of the policy, and that it is not incumbent upon the defendant to prove that such proof was not furnished.

*Defendant's Third Prayer.*—If the jury shall find from the evidence in this case that the plaintiffs are entitled to recover in this action, then their verdict must be only such proportion of the loss that the policy sued on bears to the whole amount of insurance on the property in the declaration mentioned, that is, the one-fourth of the amount of the award under the appraisal.

*Defendant's Fourth Prayer.*—If the jury shall find that no demand has been made by the plaintiffs upon the defendant for the payment of the amount of the loss sued for, then they cannot recover in this action.

*Defendant's Fifth Prayer.*—If the jury shall find that the defendant's agent offered to settle said loss upon the basis of eight hundred and odd dollars, then such offer does not constitute a waiver of the conditions of the policy sued on.

*Defendant's Sixth Prayer.*—That from the pleadings and

evidence in this cause, the verdict of the jury must be for the defendant.

*Defendant's Seventh Prayer.*—If the jury shall find from the evidence that the plaintiffs did not, within sixty days from the date of the fire, render a statement to the defendant, signed and sworn to by said plaintiffs, stating the knowledge and belief as to the time and origin of the fire, the interest of the said plaintiffs and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all incumbrances thereon, all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies, as by the terms of the policy set out, then the jury must find for the defendant, unless they shall find that the defendant waived or hindered or prevented the compliance of the plaintiffs with the conditions of the said policy of insurance.

*Defendant's Eighth Prayer.*—That there is no evidence in this cause that such preliminary proof of loss, as required by the conditions of the policy sued on in this action, was furnished by the plaintiffs to the defendant before the institution of this suit, and that there is no evidence that such preliminary proof of loss was waived by defendant, and that the plaintiffs are not entitled to recover in this suit.

*Defendant's Ninth Prayer.*—If the jury shall find there was a disagreement between the plaintiffs and defendant as to the value of the loss, and no appraisal of loss was made, then their verdict must be for the defendant, unless they shall find that the appraisal was prevented by some act of the defendant.

The Court below (ROBERTS, C. J., JONES and REVELL, JJ.) granted the plaintiffs' prayer, and rejected all of the defendant's prayers.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, PAGE and BOYD, JJ.

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*James Hewes* (with whom were *Charles T. Reifsnider* and *Charles T. Reifsnider, Jr.*, on the brief), for the appellant.

*Harry M. Clabaugh* and *Benjamin Rosenheim* (with whom was *John M. Roberts* on the brief), for the appellees.

PAGE, J., delivered the opinion of the Court.

This action was brought by Julius Traub & Bro., against the Caledonian Insurance Company of Scotland, to recover upon a policy of insurance issued by the latter for the loss by fire of certain property mentioned therein. The declaration alleges that on the 20th day of March, 1893, by a policy of insurance, in consideration of ten dollars, the defendant company agreed with the plaintiffs to insure to the extent of \$2,000 against loss or damage by fire, their stock of goods contained in the building mentioned, and to indemnify them for all such loss as they should suffer by fire, not exceeding the said sum, during the time from the "20th of March, 1893, to 20th of March, 1894," "the amount of said loss or damage to be paid in sixty days after due notice and proof of loss of the same;" that whilst the policy was in force and the plaintiffs were "interested" in the property, it was consumed, whereby the plaintiffs sustained a loss, and that forthwith they gave notice thereof to the defendant, and furnished to the defendant a full and complete account of their said loss, and were ready and willing to furnish the defendant such other documents and vouchers and proof of their loss as the defendant's officers or agents should reasonably demand, and that all times have elapsed and all things and conditions have happened and been performed to entitle the plaintiffs to said payment, and to have and maintain this action.

The pleas were: 1st, never promised as alleged; 2nd, never covenanted and agreed, &c.; 3rd and 4th, that the plaintiffs "did not, within sixty days, render a statement to the defendant stating the knowledge and belief of the said plaintiffs as to the time and origin of the said fire, and the



interest of the said plaintiffs and all others in the property, and all other insurance, whether valid or not, covering any of the said property." Replication to the 3rd and 4th pleas, waiver of the condition of the policy set out in the pleas, and joinder of issue as to the other pleas.

At the trial the plaintiffs offered to read in evidence the policy of insurance sued on, but the defendant objected, and the action of the Court in overruling the objection constitutes the defendant's first exception.

It may be remarked, there is no question before us as to the sufficiency of the declaration. That could have been raised by demurrer, a form of pleading to which the appellant did not choose to resort. But the *probata* must correspond with the *allegata*, and therefore unless the contract, to the admission of which as evidence objection is made, has been incorrectly set out in the *narr.* it ought to have been admitted *Seigman v. Hoffacker*, 57 Md. 326.

By the Code, sec. 3 of Art. 75, no particular form of words are required, nor is it necessary to set out more of the alleged contract than pertains to the obligation, the breach of which is complained of, and if the alternative qualifies the obligation, then the whole should be set out according to the legal effect. *Hoke v. Wood*, 26 Md. 460. We do not find there is a variation between the contract alleged in the *narr.* and the policy which the Court permitted to be read by the jury. There is no variation as to the parties, the date, the obligation to pay, or the time at which the payment became due, and the general statement, "that all times have elapsed and all things and conditions have happened and been performed to entitle the plaintiff to said payment and to have and maintain this action," applies to the several conditions in the policy. Whether the language employed by the pleader, in the clause just quoted, was so general as to be bad on demurrer, we are not called upon to determine. There was no error, therefore, in allowing the policy to go to the jury.

After the policy and other evidence touching the fire and

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the plaintiffs' loss had gone to the jury, a witness for the plaintiff having stated on his examination in chief, that the insurance companies and the plaintiff had agreed to enter into an appraisal of the loss, the agreement in writing to submit to an appraisal and the award of the appraisers were offered to the witness, on his cross-examination, "for identification, as the paper signed by the plaintiff and on behalf of the companies and award." On objection by the plaintiffs' counsel, the Court refused to allow the papers to be so identified, and this constitutes the defendant's second bill of exceptions. This action of the Court was clearly wrong. The policy provided for the submission to appraisers of the matter of loss, in case of disagreement between the insured and the company, and if the appraisers properly performed their duties, their award was binding upon both parties. The witness had stated that the plaintiff and the defendants had agreed in writing to enter into an appraisal, and upon cross-examination the agreement to submit and the award were offered to him to be identified. Identification is the first step towards offering a paper to a jury. It must be first identified before it can be read. The refusal of the Court, therefore, to allow its identification under the circumstances stated in the bill of exceptions, was equivalent to a refusal to allow it to go in at all as evidence. The counsel for the defendants, it is fair to presume, so understood the ruling, for he seems to have made no further effort to get it before the jury. It is contended, however, that no injury was done to the defendant by this ruling, because at a later stage of the trial the paper was fully identified, and therefore there is no reversible error. But under all the circumstances, we are unable to take this view. The refusal to permit this witness to identify was made when the subject of the amount of loss was being considered by the witness; he had stated that the companies had offered to pay \$800, and that they, with the plaintiffs, had agreed to an appraisal. The counsel, as we have said, presumably was led thereby to regard it as a re-

jection of the paper as evidence, and if this was so, and by reason thereof the paper was not offered in evidence, the defendants were deprived of testimony important to be considered by the jury in estimating damages.

The third bill of exceptions brings before us for review, the several instructions granted and rejected by the Court. The appellees' only prayer was granted, and nine, asked for by the appellants, were rejected.

The prayer of the appellees was, that if the jury find that the plaintiffs were insured by the defendants in the policy of insurance offered in evidence, and suffered a loss by fire, and that "the defendant company was notified of the said loss, as admitted by the defendant company, and shall further find that the adjuster of said defendant company, in response to the said notice, visited the place of fire, and shall further find that the said adjuster thereupon examined into the circumstances of said loss, and shall further find that he thereupon offered to pay to said plaintiffs the sum of money mentioned in evidence, and shall further find that the defendant company, or its agent, took the property of the plaintiffs into their possession and retained the same for the period of nineteen days ; and shall find that subsequently thereto the defendant company offered to pay plaintiffs the amount of an award, and denied its liability on other grounds than the absence of proof of loss, then the jury are at liberty to find from the evidence that the defendant company waived the necessity for all preliminary proofs of loss ; and if they find such waiver, then their verdict must be for the plaintiffs."

The bill of exceptions does not state a defect of proof to be the ground of objection to the prayer as required when such is the case by sec. 10 of Article 5, of the Code, and we are now only called upon to determine whether the conclusion of law therein stated is correctly drawn from the facts set forth. One of the issues before the jury was waiver *vel non*, and the purpose of the prayer was to instruct them what facts were needed to enable them to determine that in

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favor of the plaintiffs. It is well settled that questions of waiver of the preliminary proofs required by a policy of insurance, when they depend upon mere parol evidence of facts and circumstances, are for the jury, under the instruction of the Court. *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 102. And it is equally well settled, that when an insurer does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance. 1 *Wood on Fire Insurance*, sec. 525, *et seq.*

This prayer authorized the jury to find that the defendant waived the necessity for the preliminary proofs required by the policy, if they believed that the defendant was notified of the loss, and that its agents visited the premises, took possession of the property and retained it for nineteen days, and that subsequently thereto offered to pay the plaintiffs the amount of an award, and denied its liability on other grounds than the absence of proof of loss. That these facts, if proven to the satisfaction of the jury, would in law constitute a waiver, has been substantially decided by this Court. In *Fireman's Ins. Co. v. Floss & Co.*, 67 Md. 417, it was said, "the failure to make known the objection, notwithstanding the lapse of time; the fact that the defendants had themselves, with others, instituted an investigation into the circumstances and extent of the loss, and placing the refusal to pay upon other and distinct grounds than the want of sufficient preliminary proofs, furnish the amplest ground for holding all objections to such proof to have been waived by the defendants." The question of waiver was fairly put to the jury by this prayer.

We are of the opinion that all the defendant's prayers were properly rejected. The first, second and fifth ignored all the evidence tending to prove the facts set out in the plaintiff's prayer. The defendant had the right to ask an instruction upon segregated portions of the evidence, but the conclusions thus arrived at must be consistent with the truth of all other facts offered in proof. *Winner v. Penniman*, 35 Md. 163.

If the jury found such facts as would constitute a waiver in law under the plaintiffs' prayer, the propositions contained in these prayers were moot questions, having no relevancy to the issues before them.

The seventh and eighth prayers submit a question of law to the jury. Waiver in this case, depending as it did upon parol evidence of facts and circumstances, was a matter to be determined by the jury under the instructions of the Court. There was also error in the eighth prayer, in instructing the jury that there was no evidence that the preliminary proof of loss was waived by the defendant.

The third prayer ought not to have been granted, because of the agreement of the parties, that if the jury found for the plaintiff they should assess "the whole damages and loss sustained by the plaintiffs."

If the jury found the contract of insurance, the waiver of the preliminary proof of loss, and the loss of the goods by fire, the right of action had accrued and no demand was necessary. *Allegre v. The Md. Ins. Co.*, 6 H. & J. 408; and for this reason the fourth prayer was properly rejected.

The ninth prayer is defective in that whatever may be the law in respect to the nature of the arbitration clause contained in the policy as a condition precedent to the plaintiffs' right of recovery, the proof is clear there was an arbitration and an appraisal of the loss by arbitrators, though neither counsel offered any of the papers showing the results of it to the jury. The prayer therefore presented an hypothesis of fact to the jury for which no support could be found in the evidence. It was therefore properly rejected.

There being error in the ruling contained in the defendant's second exception, the judgment must be reversed and a new trial awarded.

*Judgment reversed and new trial awarded.*

(Decided December 18th, 1894.)

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Syllabus.

## JOHN ROSE vs. CHARLES BUSCHER.

*Farming Land on Shares—Partnership—Set-off—Limitations.*

The fact that two persons agree to farm land on shares, and one of them agrees to expend a certain sum of money in the farming operations, does not constitute a partnership.

If one party agrees to work on the farm of another for a share of the crops, he is not entitled to recover wages.

Plaintiff entrusted a sum of money to the defendant to be deposited for him in bank, the parties being at the time engaged in farming on shares land belonging to the defendant. In an action to recover such sum, the defendant is entitled to deduct only such amounts as he has paid by the authority of the plaintiff, and is not entitled to deduct payments made by him on account of the farming operations, which are barred by limitations.

Appeal from the Superior Court of Baltimore City. This was an action of assumpsit, brought by the appellee against the appellant. The plaintiff testified that in the spring of 1887 he agreed to work for the defendant on his farm for the sum of twenty dollars and thirty dollars per month, payable alternately, and continued so to work until October, 1888, the defendant agreeing to deposit the wages so earned in bank for the plaintiff; that in September, 1887, he received from Europe the sum of \$936, which he handed to defendant to deposit in the savings bank for him, and that of said sum of \$936 and said wages so earned, he had only received from defendant the sum of \$185.95; and further offered evidence tending to show that \$25 a month was a reasonable rate of wages for the work done by him.

The defendant testified that he and the plaintiff agreed to work the defendant's farm on shares; that nothing was said

about wages, but each party was to receive one-half of the proceeds; that the sum of \$936 delivered to him by the plaintiff was to be invested in the farm work.

The set-off claimed by the defendant was for one-half of the amount expended by him for horses, farming implements, wages and board of laborers, etc., in conducting the farming operations, and according to the defendant's account the plaintiff was indebted to him.

The following prayers offered by the plaintiff were granted by the Court below (RITCHIE, J.):

*Plaintiff's First Prayer.*—The plaintiff prays the Court to instruct the jury, that if the jury believe from the evidence that the plaintiff, in September, 1887, received from abroad the sum of \$936.00, and allowed the defendant to take charge of the same for him; and further believe from the evidence that the defendant employed the plaintiff to manage the farm of the defendant, and the defendant agreed to pay the plaintiff therefor the sum of twenty dollars the first month and the sum of thirty dollars the second month, and to alternate each month by the payment of twenty dollars and then thirty dollars; and further believe that under this arrangement the plaintiff managed the farm of the defendant for the period of seventeen months, viz., from May, 1887, to October, 1888; and that this was the only agreement between the plaintiff and defendant; and if the jury further believe that the only sums paid to or for the plaintiff by the defendant are the sums of \$100.00, paid on December 7th, 1887; \$4.10 on May 28th, 1887; \$4.00 on May 28th, 1887; \$3.10 on March 6th, 1888; \$2.25 on May 26th, 1888; 50 cents on June 23rd, 1888, and \$40.50 on October 16th, 1888, then the plaintiff is entitled to recover the said sum of \$936.00, together with the wages at the rate and for the time above mentioned, less said sums paid by the defendant to or for the plaintiff as above set out, and the jury may allow interest or not, in their discretion.

*Plaintiff's Third Prayer.*—(Granted with Defendant's Fifth).—The plaintiff prays the Court to instruct the jury,

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that even though they believe from the evidence that the defendant and the plaintiff entered into the arrangement to work the defendant's farm on shares, as testified to by the defendant ; and shall further believe that under said arrangement the plaintiff became indebted to the defendant, still, under the pleadings in this case, the jury are not allowed to deduct such indebtedness, or any part thereof, from the sum of \$936.00 left by the plaintiff in the possession of the defendant in September, 1887 (if they find such so to have been left), but they are instructed that the plaintiff is entitled to a verdict for said sum, after deducting therefrom the credits allowed in the plaintiff's first prayer, together with such additional sum of money, if any, as the jury shall find the defendant gave or returned to the plaintiff, or expended by his authority (except so far as the latter may be barred by the prayer on limitations), with interest or not, in the discretion of the jury.

*Plaintiff's Seventh Prayer.*—The plaintiff prays the Court to instruct the jury, that under the pleadings, bill of particulars of the set-off and evidence in the case, the jury, in making any deduction from the plaintiff's claim as found by them, can only deduct therefrom such of the items as are set forth in the defendant's bill of particulars as from the evidence the defendant may be entitled to and not excluded from their consideration by the instruction on limitations ; and the jury are further instructed that this prayer does not apply to any payments that the jury may find the defendant has made to the plaintiff, the defendant being entitled to a credit for whatever payments he may have made to plaintiff, and for clothing, &c., admitted by the plaintiff to have been received.

*Plaintiff's Eighth Prayer.*—The plaintiff prays the Court to instruct the jury, that even if the jury believe from the evidence that there was no special contract to pay the plaintiff wages as testified to by the plaintiff, still, if the jury believe that the plaintiff worked for the defendant at his request on his, the defendant's farm, and the defendant



accepted his work, then the plaintiff is entitled to recover from the defendant a reasonable compensation for his work, provided the jury believe there was no agreement to work the place on shares, as testified to by the defendant. And in estimating the compensation to be paid to the plaintiff for his work, the jury can consider what wages like work brought in the neighborhood.

*Court's Instructions on Limitations in Lieu of Plaintiff's Fourth and Fifth.*—That under the pleadings and uncontradicted evidence there being no evidence of any new promise, the defendant is not entitled to deduct or set-off for the moneys alleged to have been paid for the two cows, or for any clothing, etc., except such as is admitted by plaintiff, or for board of plaintiff, or for the Keck family, or of the Russian laborers.

The defendant offered the following prayers:

*Defendant's First Prayer*—(As Offered).—If the jury believe from all the evidence in the case that the defendant owned the farm mentioned in the evidence, in Anne Arundel County, and that it was agreed between him and the plaintiff that they should farm it on shares, and if they believe that no accounting has been had between the said plaintiff and the said defendant of the transactions growing out of said agreement; and if they further find that any claim the parties to this action may have against each other grows out of said agreement, then the plaintiff cannot recover in this action.

*Defendant's First Prayer*—(As Granted).—If the jury believe from all the evidence in the case that the defendant owned the farm mentioned in the evidence, in Anne Arundel County, and that it was agreed between him and the plaintiff that they should farm it on shares, and if they believe that no accounting has been had between the said plaintiff and the said defendant of the transactions growing out of said agreement, then the plaintiff cannot recover in this action in respect to his claim for wages.

*Defendant's Second Prayer*—(As Offered).—Even if the

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jury does not find that the agreement between the plaintiff and defendant was that the farm should be worked on shares ; yet, if they find that the defendant has by payments of cash to the plaintiff, and by expenditures made on his behalf by his authority or assent from time to time, discharged the \$936 received from plaintiff in 1887 ; and if they further find that the plaintiff is not entitled to wages, then the plaintiff is not entitled to recover.

This prayer granted with the following addition : " Provided that no deductions are to be allowed of any items mentioned in the prayer on limitations given by the Court."

*Defendant's Fifth Prayer*—(As Offered).—The defendant prays the Court instruct the jury, that if they believe that the plaintiff and defendant agreed to farm the property of the defendant on shares, as testified by the defendant, and that the defendant was authorized by the plaintiff to use such portions of the proceeds of the draft referred to as might be needed to pay his share of such farming expenditures ; and if they further find that said defendant also paid at various times sums of money on account of and for said plaintiff, by his authority or assent, and also paid him at various times cash, then, for such expenditures for said farming operations as defendant may have made under the said authority, and for such other expenditures and payments of cash made for and to said plaintiff, the defendant is entitled to a deduction from the \$936, proceeds of draft ; if they shall find the same was so handed to defendant, and if such payments by the defendant exceed the said sum of \$936, then their verdict must be for the defendant.

This prayer was granted with the following addition : " Provided that no deduction should be made for any of the alleged items of set-off mentioned in the instruction on limitations."

*Defendant's Sixth Prayer*—(Rejected).—If the jury believe that the plaintiff and the defendant agreed in 1887 to farm the property of the defendant mentioned in the evidence on shares, and if they believe that the plaintiff sent

for \$936.00 to Europe, with the understanding and agreement with the defendant that it was to be used in the enterprise, and that when the money was received from Europe the arrangement and understanding between the plaintiff and the defendant was that it was to be so used; and if they further find that no accounting has been had between the plaintiff and defendant of the transactions growing out of said agreement, then the plaintiff cannot recover in this action.

The defendant excepted to the granting of plaintiff's prayers and to rejection of his first prayer as offered, and to the modification of the same by the Court; and to the rejection of his second prayer as offered, and to the modification of the same by the Court; and to the rejection of his fifth prayer and to the modification of the same by the Court; and to the rejection of his sixth prayer. The jury returned a verdict for the plaintiff for \$842, and the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*Randolph Barton* and *Randolph Barton, Jr.* (with whom was *Skipwith Wilmer* on the brief), for the appellant.

*Richard M. Duvall* and *James P. Gorter*, for the appellee.

FOWLER, J., delivered the opinion of the Court.

The plaintiff sued the defendant in assumpsit on the common counts in the Circuit Court for Anne Arundel County. To this action the defendant pleaded payment and set-off, and filed with the latter a bill of particulars. The plaintiff pleaded limitations to defendant's plea of set-off, and upon the suggestion of the latter the case was thereupon removed to the Superior Court of Baltimore City, where, after several amendments of the defendant's pleadings, the case was finally tried before a jury on the common counts, to which

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there was a general issue plea, a special plea of payment as to the fifth count, and a plea of set-off, and the plaintiff's plea of limitations thereto. The verdict of the jury having been against the defendant, he has appealed. The rulings upon the prayers present the only questions for review.

The Court below granted five of the plaintiff's prayers, namely, the first, third, sixth, seventh and eighth, and gave an instruction as to the application of limitations to defendant's set-off. The defendant's first, second and fifth prayers were each modified, and his sixth was rejected.

1. The first prayer of the plaintiff is not objected to as granted, and all objections as to the sixth and eighth having been waived, we shall consider only the third and seventh.

It will be observed that the third was granted in connection with defendant's fifth prayer, and this being so, we are unable to see the force of the defendant's objection that he was, by the granting of this prayer of the plaintiff, deprived of the benefit of the evidence offered under the plea of payment. Both prayers inform the jury that the defendant is entitled to a deduction from the plaintiff's claim for all sums of money which they shall find the former paid for the latter by his authority; provided, that no deduction shall be made for any of the alleged items of set-off mentioned in the instruction on limitation.

The defendant, while conceding that limitations might be a bar to recovery for the items in the bill of particulars of his set-off, which are mentioned in the Court's instruction, suggests that such items cannot be barred when offered under the plea of payment, because limitations cannot be pleaded to payments. Without discussing this proposition, it is sufficient to say that the record does not show that any evidence as to the items excluded by the Court's instruction was offered by the defendant for any purpose. It may be assumed, perhaps, by reason of the Court's instruction, that such evidence was offered in support of defendant's plea of set-off, but there is nothing before us to show that any such evidence was offered in support of the plea of pay-

ment. On the contrary, to sustain his plea of payment, the defendant offered an account of payments and disbursements which discloses none of the items contained in his bill of particulars of set-off.

2. The first prayer of the defendant was modified, and, we think, properly so. As offered, it sets forth the proposition that an agreement to farm on shares constitutes a partnership, and that therefore there can be no recovery in this case, because there has been no accounting between the plaintiff and defendant of the partnership transactions. But we suppose it can hardly be seriously contended that the facts set forth in this prayer are sufficient to warrant us in declaring, as matter of law, that a partnership existed between the parties. It is true that after several times saying that he and plaintiff agreed to farm on shares, the defendant in his testimony once called the relation thus formed a partnership, but that did not make it so. As modified by the Court this instruction simply told the jury that if the parties agreed to farm on shares the plaintiff could not recover in this action anything for wages.

And so with regard to the sixth prayer of defendant, which was rejected. The fact that the parties agreed to farm on shares, and that the plaintiff agreed to expend nine hundred and thirty-six dollars in the farming operations does not constitute a partnership. The facts set forth in this prayer are entirely consistent with the existence between the parties of the relation of landlord and tenant. *Blue v. Leathers*, 15 Ill. 31; *Holloway v. Brinkley*, 42 Ga. 226.

What we have said in relation to the correctness of the Court's instructions as to limitations applies to the second and fifth prayers of defendant which were modified by the Court by adding to each of them the proviso that no deduction from the plaintiff's claim should be made for any of the alleged items of set-off mentioned in the instructions on limitations.

An examination of this record shows that the, defendant after making several amendments of his pleas, finally deter-

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mined to rely for his defence on payment and his theory of partnership. He had, we think, the full benefit of all the evidence he offered to sustain these defences. Upon the whole record we are of opinion the case was fully and fairly presented to the jury, and we are not disposed to disturb their verdict. Finding no reversible error the judgment will be affirmed.

*Judgment affirmed.*

(Decided December 18th, 1894.)

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JOHN H. LUTZ AND JOHN B. MCGRAW vs. MARY F.  
MAHAN AND OTHERS.

*Revocation of Letters of Administration—Renunciation—False Statement in Judicial Proceedings.*

Letters of administration were granted to a son of an intestate upon his *ex-parte* application and statement that there was no other son. There was, in fact, an elder son and two daughters, but no widow of the intestate. *Held*, that the letters so granted should be revoked, and the Orphans' Court should proceed as if this administration had never taken place.

A voluntary renunciation of the right to administer, once made, cannot afterwards be withdrawn.

When a judicial act has been obtained by fraudulent means, the Court must condemn the means and annul the result obtained by them. It will never speculate as to whether the same result may not be reached again under different circumstances.

Appeal from the Orphans' Court of Baltimore City. The case is stated in the opinion of the Court. One of the orders appealed from revoked the letters of administration granted to George W. Lutz and John B. McGraw upon the estate of Valentine Lutz, because the Court found that the representation made at the time the letters were obtained, to the effect that George W. Lutz was the only son and enti-

tled to the administration, and that he desired to associate John B. McGraw with him, was not a correct statement, as John W. Lutz was equally entitled to administration and should have been notified as required by Code, Art. 93, sec. 31. The other order appealed from dismissed the petition of John W. Lutz asking leave to withdraw his renunciation of the right to administer upon the estate.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE and BOYD, JJ.

*Lewis Hochheimer*, for the appellants.

*Fielder C. Slingsluff*, for the appellees.

BRYAN, J., delivered the opinion of the Court.

The principal question in this case is whether an order is correct which the Orphans' Court of Baltimore City passed for the revocation of certain letters of administration. There were three petitions in the cause; but before we consider their merits we will state some of the prominent facts as they appear in the transcript of the record. Valentine Lutz died intestate on the third day of January, eighteen hundred and ninety-four; on the fifth day of the same month he was buried, and on the sixth letters of administration on his estate were granted to his son, George W. Lutz, and John B. McGraw, who was associated in the administration at the request of the son. The letters were granted by the Register of Wills in the recess of the Orphans' Court. During the preliminary examination before the grant of letters, the Deputy Register asked if George was the only son of the deceased, and Mr. McGraw answered that he was. In point of fact there was another son, who was the elder brother; there were also two sisters, but no widow. It is fair to say that Mr. McGraw had no knowledge of the existence of another son. No notice of the application for letters was given to the other son, or to either of the sisters.

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Opinion of the Court

On the twelfth of January John Lutz, the elder son, filed in the Orphans' Court a renunciation of his right to the administration.

There was undue haste in obtaining the letters of administration. No one of the family of the deceased had any knowledge of the application for them, except the one who was appointed administrator. Under the law he had no superior right to his elder brother, and could not have obtained the administration if the facts had been truly stated to the Register of Wills. If any of the other members of the family had been present (as they had a right to be) this misstatement would have been corrected, and the letters would not have been issued. George certainly knew that he was not the only son of his father; but yet he permits the statement to be made in his presence without contradiction. We are not disposed to be severe in our criticism of his conduct; because the evidence shows that he is an ignorant man, totally unacquainted with legal proceedings, and most probably he very imperfectly understood the nature of the business in which he was engaged. His attention may not have been directed to the precise character of the question asked. But after every allowance is made in regard to this matter, the question as to the validity of the letters remains unchanged. They were obtained by means of an untrue statement about an essential fact. Whether the deception was the result of carelessness or mistake, or was intentionally practised, the result is the same. The grant of letters stands condemned as improperly made. The deception operated as a fraud on the Register of Wills, and caused him to render an erroneous judgment. That judgment ought surely to be set aside. It is due to the integrity of legal proceedings that a determination grounded on a falsehood should not be allowed to stand. The adjudications of the law are the declarations of justice, so far as attainable by human methods, and truth is the divinest quality of justice. It would be superfluous to enumerate instances in which Courts have dealt with great severity



with the different forms of fraud. Whether embodied in contracts, deeds, verdicts, decrees or judgments, it is struck down with relentless rigor. It cannot breathe the pure atmosphere of a Court of Justice.

It seems to have been supposed that the renunciation of John Lutz would in some way remedy the infirmity of this grant of administration. By Article 93, section 36 of the Code, the Court is required to proceed as if the person renouncing were not entitled to administer. John Lutz, by his action, excluded himself from all further interest in the administration. His wishes could not confirm an appointment already made, nor control the making of one in the future. The decision of the question rested entirely with the Court. Supposing the appointment of the administrator to have been improperly made, it would be strange indeed if a private person could give it validity by an act *ex post facto*.

It is nothing to the purpose that the same persons may thereafter be reappointed. The fraud is an offence against public justice and against the Court as the organ of the law; and it far transcends in its significance any consideration of the interests of individuals. When a judicial act has been obtained by fraudulent means, the Court must condemn the means and annul the result procured by them. It will never speculate on the question whether the same result may not be reached again under altered circumstances. The law demands not only correct decisions, but also that they should be reached by pure process. It was said in *Davis v. Calvert*, 5 Gill and Johnson, 269, that fraud vitiates everything with which it is connected; and Lord Coke said that it avoids all judicial acts, ecclesiastical or temporal.

The two daughters of the deceased joined in a petition against the two administrators for a revocation of these letters. George W. Lutz filed a separate petition against his coadministrator, John B. McGraw praying the same relief. There were other matters stated in these petitions, but we

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place our decision entirely on the views which we have expressed. We think that as the letters ought not to have been granted, complete justice demands that they should be revoked; and that the Orphans' Court should disregard this proceeding entirely, and should grant administration as if it had never taken place.

John Lutz filed a petition praying that he might be permitted to withdraw his renunciation. The Orphans' Court dismissed his petition. He does not allege that it was made through mistake, as was the case in *Thomas v. Knighton*, 23 Md. 318; nor does he allege any other sufficient reason. We think that the question is settled by *Stockdale v. Conway*, 14 Md. 99.

We will affirm all the orders in the cause.

*Orders affirmed.*

(Decided December 18th, 1894.)

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JOHN M. WAHL vs. BESSIE W. BREWER AND  
OTHERS.

*Equity—Declaring Future Rights in Property.*

A Court of Equity will not entertain a suit to construe a will, or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain.

Where property is devised to one for life with remainders over, the question whether the remainders are vested or contingent will not be determined during the life of the life-tenant and before the time arrives for the distribution of the estate, when there is no necessity for a present adjudication of the question.

Appeal from the Circuit Court of Baltimore City.

John M. Wahl, by his will executed in 1888, and probated the same year, in Baltimore City, gave his entire estate to his wife, who is still living, for life. After his wife's death

his estate is disposed of in the manner indicated subsequently in his will. The 5th clause, under which the matter in controversy arises, is briefly as follows: The residue of the estate, upon the death of his wife, is given to his five children and his granddaughter, Marie Brewer, equally, the shares to the daughters and said granddaughter to be for their lives only; and then follows this language: "And immediately after the death of any of my said daughters or my said granddaughter, Marie, I give, devise and bequeath such share or shares to any child or children of such deceased daughter or daughters, or said granddaughter, Marie, or the descendant or descendants of such deceased daughter or daughters, or granddaughter, Marie. In the event of any of my daughters or granddaughter, Marie, dying without leaving child or children, or descendants of child or children, then I give, devise and bequeath the share or shares of such daughter, daughters or granddaughter, Marie, dying without issue, to my other children or their descendants, to take *per stirpes* and not *per capita*." The granddaughter, Marie Brewer, died subsequently to the testator, leaving at her death one child, a son; subsequently, this son died, leaving a brother and sisters of the half-blood, children of the son's father by a previous marriage. An original ground rent, a piece of the testator's real estate, was conveyed to the leasehold owner, who was entitled to purchase the same, and the purchase money was brought into Court for distribution. The widow of the testator conveyed her life estate in this particular ground rent to John M. Wahl, one of the testator's children; and John M. Wahl claimed to have distributed to him one-sixth of the proceeds of sale, as the representative of one of the six shares in the 5th residuary clause of the will; and also, in addition, to have distributed to him a one-fifth of a one-sixth share, upon the theory that the Marie Brewer share of the residuary estate went to the testator's children under the terms of the residuary clause.

The account stated below made this distribution, giving the balance to the trustees under the will. The half-sisters

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Argument of Counsel.

and brother of Marie Brewer's deceased child excepted to the account, alleging that John M. Wahl was not entitled to the one-fifth of the one-sixth share of the net proceeds, but that this share was vested in said deceased child, and they were entitled to the same as the heirs at law. The Court below (DENNIS, J.) ratified the account as to the payment of the proceeds to John M. Wahl, but sustained the exceptions filed to the distribution of the proceeds of sale as being of the share of Marie Brewer, because the time had not arrived for the determination of the question. From this order John M. Wahl appealed.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Joseph P. Merryman*, for the appellant, cited: *Small v. Marburg*, 77 Md. 11; *Lyles v. Digges*, 6 H. & J. 299; *Chilton v. Henderson*, 9 Gill, 426; *Handy v. McKim*, 64 Md. 560; *Clarke v. Smith*, 49 Md. 120; *Thomas v. Higgins*, 47 Md. 439; *Stump v. Jordan*, 54 Md. 630; *Stein v. Stein*, April Term, 1894.

*Thomas Hughes*, for the appellees.

So far as John M. Wahl is concerned, the question does not affect the enjoyment of property until distribution, and hence it is a determination of a question affecting future rights, which this Court will not pass upon. The Court will never entertain a suit to give a construction, or declare the rights of parties, upon a state of facts which has not yet arisen, nor upon a matter which is future. 3 *Pomeroy's Equity Jurisp.* 2d ed. sec. 1157; *Powell v. Demming*, 22 Han. 235; *Devecmon v. Shaw and Devries*, Exrs. 70 Md. 219, 227; *Heald v. Heald*, 56 Md. 300; *Woods v. Fuller*, 61 Md. 457, 460.

The estate in favor of the children of Marie Brewer was vested and not contingent upon her having issue alive at the time of the life-tenant's decease. This case is not distin-

guishable from *Cox v. Handy*, decided at the April Term, 1893, of this Court.

*Harry M. Benzinger* (with whom was *James S. Calwell* on the brief), for the appellee, Ann R. Wahl.

There is more than an existing propriety for the immediate decision of this question. It is manifestly a condition contemplated by the provisions of Art. 16, secs. 26-31, Code Public General Laws, and in a line with the views expressed by this Court. *Pennington et al. v. Pennington*, 70 Md. 430; *Wethered, &c., v. Safe Deposit Co.*, April Term, 1894.

It is further contended by these appellees that it should go as audited—one-fifth to the appellant, the balance to the trustees under the will. This conclusion is reached upon the theory that, under the proper construction of the will of John M. Wahl, no *vesting* of the residue of his estate was to take place until after the death of the life-tenant. The appellees, Brewer, are not descendants of Marie Brewer or of her son, Joseph, and under the will of John M. Wahl they can take no interest, unless the Court decides that an absolute estate vested in Marie Brewer at the time of the death of the testator, contrary to the manifest intention of the testator. *Clarke v. Boorman*, 18 Wallace, 502; *Shore v. Wilson*, 9 Cl. & F. 525; *Abbott v. Middleton*, 7 H. L. C. 68; *Mercantile Trust Co. v. Brown*, 71 Md. 169; *Larmour v. Rich*, 71 Md. 383; *Bailey v. Love*, 67 Md. 603; *Engel v. Geiger*, 65 Md. 544; *Strauss v. Rost*, 67 Md. 476; *Demill v. Reid*, 71 Md. 191; *Herney v. McLaughlin*, 1 Price, 264; *Hill v. Rockingham Bank*, 45 N. H. 279; *Coa v. Handy* and *Boyd v. Sachs*, in this Court not yet reported.

ROBERTS, J., delivered the opinion of the Court.

The appeal in this case is taken from an order of the Circuit Court for Baltimore City, sustaining exceptions of certain of the appellees to the ratification of Auditor's Account A filed in this cause. The real question, however,

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Opinion of the Court.

which it is sought to have this Court determine, arises out of the proper construction of the fifth clause of the last will of John M. Wahl, Sr. This question is presented in the following manner: Richard Hentschell filed his bill of complaint in said Court against the appellant and appellees as defendants, to redeem a ground rent, he being the owner of the leasehold estate, the reversion being part of the estate of John M. Wahl, Sr., deceased, which passed by his said will. The answers to the bill admit the plaintiff's right to redeem, and the Court so decreed. In pursuance of the decree the plaintiff paid into Court the sum of five hundred dollars and costs, in extinguishment of said ground rent. The case being referred to the Auditor to state an account of the proceeds of sale, he allowed therein to John M. Wahl, Jr., a son of said testator, the one-fifth of the one-sixth of the balance remaining for distribution.

This allowance was excepted to on the ground that he was not entitled to the one-fifth of the one-sixth share of the net proceeds of the purchase money, because the same belonged to the heirs at law of the deceased son of Marie Brewer, who are the children by a former marriage of James R. Brewer, the surviving husband of the said Marie Brewer. This is the only question which the appellant seeks to have passed upon by this Court, and it is the same which the Court below refused to determine. To a proper understanding of the question, it will now be necessary to refer to that portion of the will of the testator in controversy, which is the fifth clause. By this provision the residue of the estate is given to his five children and his granddaughter, Marie Brewer, equally, the shares to the daughters and said granddaughter to be for their lives only, and then follows this language: "And, immediately after the death of any of my said daughters or my said granddaughter, Marie, I give, devise and bequeath such share or shares to any child or children of such deceased daughter or daughters, or said granddaughter, Marie, or the descendant or descendants of such deceased daughter or daugh-

ters, or granddaughter, Marie. In the event of any my daughters or granddaughter, Marie, dying without leaving child or children, or descendants of child or children, then I give, devise and bequeath the share or shares of such daughter, daughters or granddaughter, Marie, dying without issue, to my other children or their descendants, to take *per stirpes* and not *per capita*."

The granddaughter survived the testator, and shortly thereafter dying, left surviving her a son, who survived his mother but a short while, and died when about fourteen months old.

Shortly after the filing by Hentschell of his bill to redeem, Annie R. Wahl, the widow of the testator and the life-tenant, conveyed to the appellant all her interest in her life estate.

We fully concur with the Court below in ratifying the audit, except as to the allowance to the appellant of the one-fifth of the one-sixth of the balance for distribution. The Court in its order says: "The exceptions are sustained, but without prejudice to anyone, in raising this question at the time of the death of the testator's widow, as to the disposition of the share of said Marie, the time not having arrived for the determination of this question." The only question open in this appeal, is whether the time has arrived when the disposition of the share of said Marie ought to be declared.

The appellant's contention is, that the estate in remainder of Joseph Brewer, deceased son of the said granddaughter Marie, was contingent, depending upon his survivorship of the life-tenants, and so long as either of those life-estates existed, the contingency of his survivorship continued; and in that event the character of the remainder in him is determined by this collateral contingency, his survivorship of the life-tenants, and his living at the time of the determination of his life-estate; that this determines the character of the estate in remainder in Joseph Brewer, the son of Marie, and makes it contingent.

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If the appellant's theory be correct, that the character of the estate in remainder is contingent, whose rights will be concluded by any determination of the question at this time? In so far as his rights are involved, the question is one of but small interest to him, whether it is determined now or at some future time, as it depends upon *his* being alive at the life-tenant's death. It certainly is a purely speculative surmise which the future alone will reveal, as to who may be the proper parties in the proceeding to determine the question now sought to have passed upon. As said in the argument, "we are contesting the question of vesting now, with the appellant, when, if he should be dead when the life-tenant dies, we may have to contest the same identical question with his descendants who are then living, and who would not be bound by any decree in this cause, as they are not parties herein."

It is well settled that a Court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, *contingent* and uncertain. 3 *Pomeroy's Eq Juris* 2 ed. 1157; *Minor v. Taylor*, 129 Mass. 160; *Powell v. Denning*, 22 Hun. 235. This Court has announced the same doctrine in *Heald v. Heald*, 56 Md. 307; *Devicmon v. Shaw and Devries, Exrs.*, 70 Md. 235; *Woods v. Fuller*, 61 Md. 460.

Under the construction given by this Court in *Pennington v. Pennington*, 70 Md. 430, to the provisions of the Act of 1888, ch. 478, now embraced in the Code as secs. 26-31 of Article 16, sub-title, "Declaratory Decrees," we do not consider that this case can be properly considered as coming within the object sought to be accomplished by the passage of that Act. It follows that the decree below must be affirmed.

*Decree affirmed with costs.*

(Decided December 18th, 1894.)



THE MAYOR, COUNSELLOR AND ALDERMEN  
OF THE CITY OF ANNAPOLIS vs. WILLIAM  
HOWARD.

*Appeal—Habeas Corpus.*

No appeal lies by a municipal corporation from an order of a Judge of a Circuit Court, in a *habeas corpus* proceeding, discharging the petitioner from custody under a commitment issued by a Justice of the Peace on a judgment convicting him of violating an ordinance of the municipality.

Appeal from the Circuit Court for Anne Arundel County.  
The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., MCSHERRY,  
FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Elihu S. Riley*, for the appellant.

*James W. Owens* and *J. Randall Magruder*, for the appellee.

ROBERTS, J., delivered the opinion of the Court.

The appeal in this case is taken from an order passed by the Honorable James Revell, one of the Associate Judges of the Fifth Judicial Circuit of the State of Maryland, discharging the appellee from the custody of the Sheriff of Anne Arundel County. It appears from the record that the petitioner was in the custody of the sheriff of said county under a warrant of commitment issued by a Justice of the Peace of said county on a judgment convicting him of violating an ordinance of the city of Annapolis, requiring all persons, who bring their own growth of products to the city for sale during market hours, to take out a license

Md.]

Opinion of the Court.

therefor. In this state of case, the appellee applied for the writ of *habeas corpus*. The only question before us is, whether an appeal lies from an order of this character.

The appellant, in its brief, admits that "up to the present, Maryland has neither allowed writs of error nor appeals from orders on *habeas corpus*, except under the Acts of 1874 and 1880." But it is contended that since the passage of the Act of 1892, ch. 506, a different practice ought to prevail, and appeals in *habeas corpus* cases be allowed. An examination of the provision of that Act will not justify any such conclusion. Section 77 of the Act reads: "The parties to criminal proceeding shall be entitled to bills of exceptions, in the same manner as in civil proceedings, and appeals from *judgments* in criminal cases may be taken in the same manner as in civil cases," &c. The appellant's contention can only be made effective by construing the order passed by the learned Judge in this case as a judgment in a criminal case, from which an appeal would lie in the same manner as in civil cases.

To do this, would require us to reverse a long line of decisions in this Court, which have not, in a single instance, been departed from. As illustrating the view which has been so long sanctioned by this Court, and which, we think, we are fully justified in reasserting, notwithstanding the supposed growth of a different doctrine in other States, we call attention to the views of this Court as stated in *Bell v. State*, 4 Gill, 301. In that case the Court had under consideration the 6th section of the Act of 1785, ch. 87, which is now found in the Code, Art. 5, sec. 2, slightly modified, but not materially changed, and reads as follows: "From any judgment or determination of any Court of Law in any civil suit or action, or in any prosecution for the recovery of any penalty, fine or damages, any party may appeal to the Court of Appeals." Judge Martin, delivering the opinion of the Court in Bell's case, said: "It is clear, we think, that the order of a County Court dismissing the application of the petitioner to be discharged from custody on a writ of *habeas*

*corpus*, is not a determination or judgment of the Court in a civil suit or action, in the contemplation of the Act of 1785, chap. 87, so as to authorize an appeal. The writ of *habeas corpus*, although a most important and valuable remedy, and brings up the body of the party, with the grounds on which he has been deprived of his liberty, for the examination of the Court, is a proceeding summary in its character, addressed to the discretion of the Judge or tribunal to whom the application is made, so far as the discharge of the party is concerned; a proceeding where, in many cases, the evidence upon which the judgment is founded, cannot be presented to the Appellate Court, and is not final and conclusive upon the party applying for the writ, as he may prefer a similar application to any other Judge or Court of the State. An order, therefore, dismissing such a petition, has none of the characteristics of those judgments, which have been regarded by this Court as proper subjects for an appeal." See also, *ex parte O'Niell*, 8 Md. 229; *Mace v. State*, 5 Md. 337; *ex parte Coston*, 23 Md. 271; *State v. Boyle*, 25 Md. 509; *Coston v. Coston*, 25 Md. 506.

The provision of Article 42, sec. 17 of the Code, has not been invoked, nor do we see how it could be made applicable to this case; we therefore deem further comment unnecessary, as no constitutional question has arisen herein. We all concur in the view that no appeal lies in this case, and the motion to dismiss must prevail.

*Appeal dismissed with costs.*

(Decided December 18th, 1894.)

Md.]

Syllabus.

ELBERT THOMSON vs. ALBERT RITCHIE AND  
JOHN E. SEMMES, TRUSTEES, AND I. S. FILBERT,  
PURCHASER.

*Trustees' Sale—Highest Bidder—Exceptions.*

A trustee's sale, fairly made, will not be set aside because a person unknown to the auctioneer or to the trustee, wrote a letter on the day of the sale to the auctioneer authorizing a higher bid to be made, and enclosing the required deposit, when such person is not present at the sale, and the trustee is not aware that he would be able or willing to make the first cash payment and give security for the deferred payments, and when the party objecting to the ratification of the sale is a former purchaser of the property who had failed to pay all of the purchase money, the re-sale being at his risk.

*Held*, upon the facts of this case that an exception to the ratification of the trustee's sale upon the ground of inadequacy of price should not be sustained.

Appeal from an order of the Circuit Court of Baltimore City (DENNIS, J.), overruling exceptions to a trustee's sale and finally ratifying the same. The case is stated in the opinion of the Court.

The cause was argued before BRYAN, MCSHERRY, FOWLER, PAGE and ROBERTS, JJ.

*William A. Fisher* and *C. Ross Mace*, for the appellant.

The price for which the property was resold was greatly inadequate, and this fact should be considered in connection with the other objections to the sale. *Johnson v. Dorsey*, 7 Gill, 292; *Glenn v. Clapp*, 11 G. & J. 9; *Loeber v. Eckes*, 55 Md. 3; *Andrews v. Scotton*, 2 Bland, 644; *Tomlinson v. McKaig*, 5 Gill, 277.

The trustees did not use their best endeavors to obtain the highest price for the property. (a.) Because they unreasonably refused to adjourn the sale to a more advanta-

geous time. *Bateman on Auctions*, 115, note *a*; 246, note *b*; *Perry on Trusts*, sec. 771; *Bell v. Webb*, 2 Gill, 169; *Gould v. Chappell*, 42 Md. 470; *Large v. Ditmars*, 27 N. J. Eq. 406; *Ord v. Noel*, 5 Madd. 440; *Brock v. Rice*, 27 Gratt. 816. (*b.*) Because their conduct at the sale was such as to create misunderstanding and discourage bidders. *Hil-leary v. Thompson*, 11 W. Va. 113; *Dawson v. Drake*, 29 N. J. Eq. 383; *Wetzler v. Schauman*, 24 N. J. Eq. 60; *Rea v. Wheeler*, 27 N. J. Eq. 292; *Campbell v. Gardner*, 11 N. J. Eq. 423; *Hintze v. Stengel*, 1 Md. Ch. 283; *Andrews v. Scotton*, 2 Bland, 644.

The property was not sold to the highest bidder. It is not necessary that a person should be present at an auction to become a purchaser. He may make his bid by letter. *Tyree v. Williams*, 3 Bibb (Ky.) 365; *Dickermann v. Burgess*, 20 Ill. 266. Bids are not to be considered nominal. *Cornell v. McCann*, 48 Md. 604.

*Joseph W. Hazell* (with whom was *George R. Willis* on the brief), for the appellee, Filbert, cited: *Stephens v. Magruder*, 31 Md. 171; *Schaeffer v. O'Brien*, 49 Md. 253; *Gray v. Viers*, 33 Md. 22; *Kelso v. Jessop*, 59 Md. 119; *Farmers' Bank v. Clark*, 28 Md. 145; *Manahan v. Lammon*, 3 Md. 463; *Wilson v. Miller*, 30 Md. 82; *Elliott v. Knott*, 14 Md. 121; *Davis v. Helbig*, 27 Md. 453; *Lenderking v. Rosenthal*, 63 Md. 28; *Garritce v. Popplein*, 73 Md. 322.

*Steele, Semmes & Carey*, for the trustees.

BRYAN, J., delivered the opinion of the Court.

On the twenty-second day of July, eighteen hundred and ninety-two, a decree was passed by the Circuit of Baltimore City for the sale of certain real estate, known as the Water's Wharf property. The decree was passed for the purpose of dividing the proceeds of sale among heirs. On the fifth day of January, eighteen hundred and ninety-three, the

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property was offered for sale by public auction, but no bid was obtained. Afterwards it was sold at private sale to Elbert Thomson for thirty thousand seven hundred and fifty dollars, whereof five hundred dollars was to be paid in cash, and the remainder when the sale should be ratified. A broker was paid by the trustees seven hundred and fifty dollars for negotiating this sale. It was finally ratified on the twenty-fifth of February. The purchaser having made only the cash payment of five hundred dollars, the trustee, on the eleventh of March, filed a petition for a resale, and on the twentieth of April, a resale was ordered by the Court. On the fifteenth of May, by consent of the trustees and the purchaser, the order for resale was rescinded, and an order was passed providing that the purchaser should pay costs, expenses, &c., and should also pay six thousand dollars on account of the purchase money; and that thereupon, the trustees should deliver to him possession of the property, on which he should make certain repairs; and that he should pay the remainder of the purchase money, with accrued interest, on the first day of November, eighteen hundred and ninety-three; and providing further, that upon default of payment by the purchaser, he should immediately surrender the property to the trustees; and that without further order of the Court, they should proceed to resell. The purchaser having failed to pay the balance of the purchase money remaining due, the trustees sold the property by public auction on the eighteenth day of December, eighteen hundred and ninety-three, to Isaac S. Filbert. The advertised terms of sale were as follows: "One-third cash, balance in two equal installments at 6 and 12 months from the day of sale, the credit payments to bear interest from the day of sale and to be secured to the satisfaction of the trustees, or all cash at the option of the purchaser. A deposit of \$500.00 will be required at the time of sale." Exceptions to the ratification of the resale were filed by Thomson, the former purchaser. The exceptions were overruled, the sale was ratified, and appeal was taken by Thomson.

There were a number of exceptions to the sale, but the important points of objection were three: first, gross inadequacy of price; second, that the property was not sold to the highest bidder; third, that the trustees did not use their best endeavors to obtain the highest price which could be obtained. The resale was regularly advertised, and it was made at the time and place mentioned in the advertisement. A very unusual incident which occurred at the sale has furnished the principal ground of controversy in this case. As the auctioneer entered the salesroom, Mr. Renner, who has the charge of it, handed him a letter; upon opening it he found that it contained an order to buy the property signed by Thomas L. Lister, and also five hundred dollars, the deposit required by the advertised terms of sale. Mr. Renner did not know the name of the person who gave him the letter, and did not know its contents. It was proved in the testimony that the money was placed in the letter by G. Lloyd Rogers, and that he was the person who handed it to Renner. Rogers testified that he proposed to buy the property on his own account, and that he had made with the Bank of Commerce the arrangements which he considered necessary for the purpose. He had procured from the bank five hundred dollars. This was the money which was put in the letter signed by Lister. The auctioneer, before commencing the sale, consulted the trustees, and asked them what course he was to pursue in reference to the Lister letter; they each declined to take any responsibility in the matter, or to give him any instructions. The property was offered, and it ran up to twenty-eight thousand five hundred dollars, which sum was bid by Isaac S. Filbert. The auctioneer then consulted the trustees, who instructed him to sell the property at that price, if no further bid could be obtained. He then stated from the auction stand that he had a letter from a Mr. Lister, whom he did not know, asking him to buy the property for him, and to bid more money for it than had been so far offered; and he further said, that if Mr. Lister was present, or any

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one was there to represent him, who was satisfactory to the trustees, he would accept the bid, inasmuch as the deposit of five hundred dollars was enclosed in his letter. Mr. Rogers at this point approached the trustees, and asked whether they would accept the bid in behalf of Lister; they told him that was a matter left to the auctioneer. Mr. Rogers then asked the trustees to postpone the sale, and said that, in desiring the postponement, he represented Thomson, the former purchaser. Rogers testified that he asked the auctioneer if he would accept his bid, and that the auctioneer replied, "If the trustees will not take your bid, I cannot." Another witness testifies the same thing. The auctioneer testifies that Rogers did not say that he wished to bid for himself, and that his own remark was in reference to the Lister bid, which Rogers desired to be accepted. This is the probable explanation of a seeming discrepancy in the evidence, and this is fully sustained by the testimony of the two trustees. Rogers does not say that he made any bid. His testimony on this point is as follows:

"I offered to make a bid, and before I offered to make it, Mr. Kirkland was crying the property, and crying \$28,500, and I thought he was about to knock it down, and raised my hand, kind of motioned to him, and he cried out \$29,000, and I thought that that was for my bid; he then called out to a Mr. ———, I have forgotten the name, and no one answered, and then he had a consultation with the trustees, and I went up to the front of the room, and then learned that he made this bid, or cried this \$29,000 on the authority of a letter that he had." He was very much interested in procuring the Lister bid to be accepted. The auctioneer testified that if Rogers had made a bid on the property, he would have accepted it, and then it would have been for the trustees to say whether it was acceptable to them. But it appears that the five hundred dollars necessary for a deposit, which Rogers had provided, had been enclosed by him in the Lister letter, and was no longer in



his possession. As no one bid more than Filbert, the property was knocked down to him.

We have given a statement of the important facts as they appear to us to be established in proof. If Lister really wished to bid for the property, he ought not to have pursued such a singular and mysterious course. He might have had some authorized representative at the sale, or he might have made himself known to the trustees or to the auctioneer. But he appears to have given himself no concern about the matter; even the deposit of five hundred dollars contained in his letter to the auctioneer, was placed there by Rogers. He has not appeared since the sale to claim any rights, nor does it appear from anything in the record that he would have been a responsible bidder. The terms of sale required (besides the deposit) one-third of the purchase money in cash and the balance in two equal installments, at six and twelve months from the day of sale, the credit payments to bear interest and to be secured to the satisfaction of the trustees, or all cash, at the option of the purchaser. Lister certainly would have no right to become the purchaser, unless he was able to comply with these terms. Most assuredly the trustees could not be required to assume that an unknown man, and one who seemed determined to remain unknown, was either able or willing to make the cash payments and give the required security. And so far as we learn from the record, they have not yet any reason to believe it.

Lister being out of the question, Filbert was the highest bidder. There is no foundation for the charge that the trustees did not diligently and faithfully perform their whole duty. This question may be dismissed without further remark. The allegation of gross inadequacy of price is not sustained. The opinions of the witnesses about the value of the property are not as convincing as the actual offer of money by persons prepared to pay for it. The highest offer which the trustees could obtain, after much effort, was thirty thousand seven hundred and fifty dollars, and of this

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Syllabus.

sum, with the sanction of the Court, they paid to a broker seven hundred and fifty dollars for negotiating the sale. This price was satisfactory to the owners of the property on whose account the sale was decreed to be made. The trustees extended great indulgence to the purchaser in affording him opportunities for payment; but, after nearly eleven months of strenuous endeavor, were unable to collect the money from the man who now alleges that a price about two thousand dollars less is grossly inadequate. There is no circumstance to impeach the regularity and fairness of this sale. The price is probably somewhat below the real value of the property, but we could not set the sale aside for this reason, without violating well-established precedents. This question has been so frequently before this Court that we deem it unnecessary to refer to the decided cases.

*Order affirmed.*

(Decided December 18th, 1894.)

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CARROLL S. MACGILL AND OTHERS vs, HARRIET  
R. HYATT, TRUSTEE.

*Creditors' Bill—Estates of Decedents—Mortgage Creditor—Jurisdiction of the Orphans' Court.*

A creditors' bill to subject the real estate of a decedent to the payment of a mortgage debt must allege that the personal estate of the decedent is insufficient for the payment of his debts.

Where a creditors' bill is filed for the sale of a deceased debtor's real and personal estate, the general rule is that the personal representatives of such debtor must be made parties.

A creditor of a decedent is not entitled to maintain a bill in equity to administer the deceased's estate, because the whole of it, both real and personal, belongs to his children, when there is no allegation of the insufficiency of the personal estate, and in the absence of any attempt to invoke the aid of the Orphans' Court.

The estates of deceased persons should ordinarily be administered and finally distributed in the Orphans' Courts.

Plaintiff, the mortgagee of a deceased debtor, the mortgage being overdue, was in possession of the property. The executor of the mortgagor died without having made any return to the Orphans' Court, and no administrator *c. t. a.* was appointed. Plaintiff, without foreclosing the mortgage or taking any steps in the Orphans' Court, filed a general creditors' bill against the sureties of the deceased executor and the children of the deceased mortgagor praying for an account of the whole estate and the application of the same to the payment of all debts. *Held*, upon demurrer, that the bill should be dismissed.

In such case the plaintiff should have proceeded in the Orphans' Court to have an administrator *d. b. n. c. t. a.* appointed, who could have obtained and distributed the estate of the deceased mortgagor without the aid of a Court of Equity, or, if the personal estate proved insufficient, the plaintiff should have sold the mortgaged property and claimed from the general estate only for the deficiency.

A mortgage creditor, after having exhausted his security by a sale, may come in *pari passu* with other creditors, but he should not be allowed to hold on to the mortgage security and at the same time demand payment of the mortgage debt out of the fund which should be appropriated to the claims of the unsecured creditors.

Appeal from an order of the Circuit Court for Baltimore County (BURKE, J.), overruling the defendant's exceptions and demurrer to the bill of complaint. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., MCSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Talbot J. Albert*, for the appellants, cited: 1 *Story Eq. Pldg.* secs. 101, 270; *Taylor v. Bruscup*, 27 Md. 225; *Worthington v. Herron*, 39 Md. 145; *Abbott v. Golibert*, 39 Md. 555; *Dalrymple v. Gamble*, 66 Md. 307; *Wilson v. Wilson*, 23 Md. 162; *Barney v. Morgan*, 1 Sim. & Stu. 358; *Jones v. Garcia, etc.*, 1 Turn. & Russ. 297; *White v. Hillard*, 3 Young & C. 597.

*Frederick W. Story*, for the appellee, cited: *Lingan v. Henderson*, 1 Bland, 282; *Andrews v. Scotton*, 2 Bland, 665;

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*Wilhelm v. Lee*, 2 Md. Ch. 322; *Brown v. Stewart*, 1 Md. Ch. 87; 4 *Kent Com.* 183; *Tessier v. Wyse*, 3 Bland, 57; *Hammond v. Hammond*, 2 Bland, 347; *Wilson v. Wilson*, 23 Md. 169.

FOWLER, J., delivered the opinion of the Court.

The appellee, Harriet R. Hyatt, trustee, is a mortgage creditor to the amount of two thousand dollars of the late Mary C. Macgill, who died in 1888, leaving a will duly executed and proved, the contents and purport of which do not appear in this record—except that it is alleged in the bill of complaint that her husband, the late Oliver P. Macgill, was thereby duly appointed executor. Nor does it appear whether the large and valuable real and personal estate of which it is alleged she died possessed was bequeathed and devised to her children or to others. The executor accepted the trust imposed upon him by the will and gave bond in the sum of six thousand dollars, but made no returns to the Orphans' Court of Baltimore County, from which his letters testamentary had been issued.

The mortgage debt was overdue and in arrear during the lifetime of Mrs. Macgill, and so continued after her death and during the life of her executor, the interest having been duly paid to the 13th day of August, 1891. It does not appear that any demand for the payment of this indebtedness was made either upon the deceased or her executor. From first to last, no proceedings whatever appear to have been taken in the Orphans' Court by the appellee to have her account passed against the estate of her debtor, nor has she ever taken any steps to compel the executor to account for and distribute the estate, nor after his death to have appointed in his place an administrator *d. b. n.* For nearly a year before the institution of this suit, the mortgaged premises were in the possession of the appellee as mortgagee, and during that time she has collected the rent and appropriated it to the payment of prior incumbrances.

Under these circumstances the appellee has filed a gen-

eral creditors' bill against the sureties of the deceased executor and the children of the deceased debtor, praying that the defendants may be required to discover and account for the whole real and personal property of the deceased, and especially that the two defendants who are sureties of said executor may account for all the estate which came or ought to have come into the hands of their principal; that the personal estate, as yet unadministered, may be applied, so far as it will go, to the payment of all debts, and that, after the exhaustion of personal assets, the real estate may be sold for the payment of any unpaid balance of debts.

To this bill the defendants demurred upon several grounds, some of which we will proceed to consider.

1. The first is that the matters complained of are peculiarly within the jurisdiction of the Orphans' Court. There can be no doubt that under the system prevailing in this State, the estates of deceased persons should ordinarily be administered and finally distributed in that Court. In *Hewitt's case*, 3 Bland, 184, it was said that "The power to make a distribution \* \* of the personal estate remaining in hands of the administrator has been conferred upon the Orphans' Court, with which this Court should not interfere, except on account of some special circumstances to which the powers of the Orphans' Court may not be altogether adequate." And in *Alexander v. Leaken*, 72 Md. 199, in which the case just cited is referred to, we said, citing section 230 of Code, Art. 93, these Courts "have full power to take probate of wills, grant letters testamentary and administration, direct the conduct and settling of accounts of executors and administrators, superintend the distribution of the estates of intestates \* \* \* and to administer justice in all matters relative to the affairs of deceased persons."

The last clause of the section just quoted is very broad, and shows the legislative intention was to confer adequate power and jurisdiction upon Orphans' Courts in every case in which their general powers would enable them to act.

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It is true that in a number of cases we have said that personal representatives and others interested in the settlement of estates of deceased persons may seek the aid of a Court of Equity, as in *Woods v. Fuller*, 61 Md. 459, where it was held that a trust having been imposed upon the executor, he may, if in doubt, have the direction of a Court of Equity as to how he shall discharge it; distributees may file a bill in equity against an administrator for their share of the intestate's estate, and a legatee may adopt the same proceeding to recover a legacy. *Conway v. Green*, 1 H. & J. 151; *Woods v. Fuller*, *supra*. And in *Alexander v. Leakin et al.*, just cited, the application to a Court of Equity on the part of certain non-residents as next of kin was maintained on the ground that the powers of the Orphans' Court were not altogether adequate to afford complete protection and relief.

The bill, in this case, however, does not, we think, make a case beyond the general and ordinary powers of the Orphans' Court. The debtor having, as is alleged, a real and personal estate of great value, departed this life leaving a will duly executed and proved. The executor named in the will, after duly qualifying, died without having fully or at all administered the estate. One of the children of the deceased debtor is charged with having concealed and counseled others to conceal information concerning the estate. Our Code, section 70, Art. 93, provides for the appointment of a successor of the deceased executor, and sections 238 and 239 of the same article, give to Orphans' Courts full power to proceed against any administrator or other person charged with concealment. We think that the appellee should have proceeded in the Orphans' Court of Baltimore County to have an administrator *d. b. n. c. t. a.* appointed, who could, so far as we can now ascertain, have obtained the personal estate, and could have distributed it without the aid of a Court of Equity.

2. But assuming for the present that the appellee can in any aspect of the case file a creditor's bill to subject real

estate to the payment of his mortgage debt, is the bill filed in this case a good one? The allegation necessary to give equity jurisdiction is wanting. There is no sufficient allegation anywhere in the bill that the personal estate left by the deceased debtor was insufficient to pay her debts. It is alleged in the 9th paragraph, "that the personal estate \* \* or at least such portion thereof which now remains, is not sufficient," &c., &c. But this is far from what is required. *Non constat* that sufficient personal property did not come into the hands of the executor to pay all debts; and if so, the remedy of the creditor would be on the executor's bond. *Wyse et al. v. Smith & Buchanan*, 4 Gill & J. 302. Before the real estate of the deceased debtor can be appropriated to the payment of debts, the deficiency of the personal estate *left* by the decedent must be alleged and proved. Without such allegation a Court of Equity has no jurisdiction. *Lyde Griffith v. The Frederick County Bank*, 6 Gill & Johnson, 445, &c.

3. Not only is the bill thus defective, but the appellee, being a mortgage creditor, has never attempted to avail herself of her special lien by exercising her power of sale, although she has had ample opportunity to do so. She could, therefore, have easily ascertained whether the proceeds would suffice to pay her claim, or, if not, what the deficiency would be. There may have been no deficiency, for the sale may have produced more than enough to pay her debt. It does not seem just to other creditors (and the theory of the bill is that there are others), that the mortgagee should be allowed to hold on to her mortgage security, and at the same time demand payment of the mortgage debt out of the fund which should be appropriated to the satisfaction of the claims of the unsecured creditors.

In this case the mortgagee does not appear to have offered to surrender her security, or to sell the mortgaged estate for the purpose of paying her claim in whole or in part. This latter, we think, under the circumstances of

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this case, would have been the equitable course for her to pursue, and one which is generally recognized and approved by Courts of Equity. Thus in *Hammond v. Hammond* (*supra*), the chancellor says that while liens must be respected, they will not be allowed to be used to the injury of unsecured creditors if they can be enforced without such injury; and, therefore, "a mortgage creditor, *after* having exhausted the mortgaged estate *by a sale*, may come in *pari passu* with other creditors." And in *Amony v. Francis, Admr.*, 16 Mass. 311, PARKER, C. J., announces the rule to be that every creditor having a mortgage or other security shall *before he is admitted* to prove his debt, surrender his security for the benefit of the other creditors, the proceeds going to the common fund, or shall suffer the pledge to be sold, taking the proceeds towards his debt and proving for the residue. And in conclusion he says, as we say here: "If the creditor had taken possession of the mortgaged premises and and foreclosed the mortgage, he would have a right to prove for the balance." See also to the same effect *Farnum v. Boutelle*, 13 Metc. 159; *Trustee, &c. v. Cronin*, 4 Allen 141. And in 1 *Story's Equity Jurisp.* sec. 633, the learned author lays down the rule in substantially the same terms as those used by the Chancellor in *Hammond v. Hammond, supra*,

4. There is another ground on which the demurrer was based, namely, the failure to make the personal representative of the deceased debtor a party to this proceeding. This, we think, is also a valid objection, for in our opinion, upon the facts alleged, the personal representative is a necessary party.

It is conceded this is generally so where, as here, a creditor's bill is filed for the sale of a deceased debtor's real and personal estate. *Tyler v. Bowie*, 4 H. & J. 333; *David v. Grahame*, 2 H. & G. 94; *The Mayor v. Chase*, 2 G. & J. 376; *Birely v. Staley*, 5 G. & J. 432, and *Hammond v. Hammond, supra*. But it is contended that under the circum-



stances of this case the rule may be disregarded, because it is not applicable. To sustain this position, *Hammond v. Hammond, supra*, and *Tessier v. Wyse*, 3 Bland, 57, were cited, but we do not think they help the appellee's case. It is said in *Hammond's case*, that a creditor's bill may be sustained against heirs and devisees of a deceased debtor alone without joining the personal representative, if it plainly appears in the case that the debtor left no personal property whatever, or so little that no one had taken out letters of administration. It is sufficient to say that the bill here alleges the deceased left "personal estate of great value." The other contingency, as stated by the chancellor in *Hammond's case*, which will justify the omission of the personal representative as a party, is the death or insolvency of such representative. But it seems to us clear that he is not to be understood as saying, that the allegation of either of these or both together would alone give jurisdiction in the absence of any proper allegation of the insufficiency of the personal estate. For such a construction of the chancellor's language would put him in conflict with the settled rule that to give jurisdiction such insufficiency must be clearly alleged.

The case of *Tessier v. Wyse, supra*, is based upon a state of facts very different from that presented by the bill in this case. There it was held that the children of William Wyse being entitled to the real estate as heirs at law, and to the personal estate as his next of kin, they had both funds in them, and that so circumstanced, it was immaterial *as to them*, out of which fund the debt was paid, and therefore it was held that the administrator was not a necessary party. Here the deceased left a will, but whether her personal and real estate are in the hands of the defendants, we do not know, for, as we have said, her will is not to be found in this record. But we are not willing to sanction the rule of practice which is sought to be established by the case of *Tessier v. Wyse*, namely, that without regard to the insufficiency of the personal property, and in the absence of any attempt to

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invoke the aid of the Orphans' Court, a creditor's bill may be filed in equity to administer a decedent's estate, because the whole of the estate, real and personal, happens to belong to his children. Such a rule would not only deprive the Orphans' Court of a large part of its jurisdiction and vest it in a Court of Equity, but would be in conflict with the settled rule we have just referred to.

There were other grounds on which the demurrer was based, but we need not consider them. What we have said disposes of the case. It follows that the demurrer must be sustained and the bill dismissed, without prejudice, however, to the right of the appellee to take such further proceedings as she may be advised may be necessary.

*Bill dismissed without prejudice. Order reversed with costs to appellants.*

(Decided December 18th, 1894.)

WM. J. HOOPER ET AL., TRUSTEES, vs. EDWARD L. FELGNER ET AL., EXECUTORS AND GUARDIANS. EDWARD L. FELGNER ET AL., EXECUTORS AND GUARDIANS, vs. WM. J. HOOPER ET AL., TRUSTEES.

*Duration of Trust Estate—Devise for Life in Trust, with Remainder Over—Trusts of Personal Property—Guardian and Ward.*

Where real estate is given to trustees and their heirs in trust to pay the net income to one for life, and upon his death in trust for his children and the issue thereof living at his death, absolutely the trust ceases upon the death of the life-tenant, the interest of the *cestuis que trust* in remainder being then converted into a legal estate.

The same rule is applied where the trust embraces personal property, and when all the objects of the trust have been accomplished, the person entitled to the beneficial use is regarded as the absolute owner, and as such is entitled to the possession of the property. Nor will the minority of the *cestuis que trust* in such case cause the trust to continue until they become *sui juris*, but the guardians of such infants are entitled to hold the property.

Real estate was devised to trustees upon trust to permit the testator's daughter G. to use the same and to take the net rents, etc., during her life, without power to anticipate the income or encumber the trust estate, and at her decease, upon trust for the children of G. then living and the issue of any then deceased child; in default of children a power of appointment by will was given to G. After the death of the testator, G. died, leaving two daughters, one of whom was under age. *Held*, that upon the death of G., the life-tenant, the trustees had no longer any active duties to perform, and the legal estate being executed under the Statute of Uses in the two daughters, the trust was at an end.

Personal property was bequeathed to trustees upon trust to pay the net income thereof to the testator's daughter G. for life, without power of anticipation or to encumber the estate, and from her decease upon trust for all the children of G. then living, and the issue of any deceased children. *Held*, that upon the death of G., leaving two daughters, one being an infant, the objects of the trust were accomplished, and G.'s daughters became the absolute owners of the property, the share of the infant daughter being payable to her guardian.

Cross appeals from the Circuit Court of Baltimore City. Proceedings were instituted in said Court for the purpose of making partition of the residue of the estate of William E. Hooper, deceased, and by the return of the commissioners,

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ratified April 25, 1893, personal property valued at the sum of \$210,382 was allotted to Wm. J. Hooper and others, trustees under the will of said decedent, in trust for the testator's daughter, Grace Felgner, for life, as hereinafter set forth. The life-tenant died in September, 1893, leaving two daughters, Marie Theresa and Catharine Hooper Felgner, aged about nineteen and thirteen years, respectively, and no other descendants. In December, 1893, the said trustees filed a petition in said cause setting forth the above facts, and also that the petitioners held certain real estate devised in trust for the said Grace Felgner, and asking for an order directing what disposition should be made by them of the property so held in trust.

By the sixth clause of his will, Wm. E. Hooper devised to his four sons and the survivors, two lots of ground "upon trust to permit my daughter, *Grace Felgner*, to use, occupy and enjoy the same, and the net rents, income and profits thereof, to take during her natural life without power to her to anticipate the payment of such rents and income or to charge or encumber the trust estate; (and upon her decease upon trust for the child or children of the said Grace living at the time of her death) and the then surviving issue of any then deceased child or children of said Grace, but so that such issue, if such there be, shall take by representation the share or portion only which the parent or respective parents, if living, would have taken. But should no child or descendant of my daughter Grace survive her, then this share of my estate shall be subject to such appointment or disposition thereof by last will and testament, or writing in the nature thereof, unto or among any one or more of my then surviving grandchildren and surviving issue of my then deceased grandchildren, as my said daughter Grace shall be pleased to make; and in default thereof, and so far as any such appointment or disposition shall or may fail to be a full and effectual disposition of said property, then this portion of my estate, or so much thereof as shall not be fully disposed of as aforesaid, to be divided equally *per capita*

among all my grandchildren then living and the surviving issue of my then deceased grandchildren absolutely ; so, however, that each issue shall represent their parent or parents, and take only the share to which the latter would have been entitled had he, she or they survived."

By the twelfth clause of his will, the testator directed that the residue of his estate should be divided into ten equal shares, and gave one of said shares to the same trustees "upon trust to pay the net income thereof, as it shall accrue (except as hereinafter provided), unto my daughter, Grace Felgner, during her natural life, and for her sole and separate use, without power of anticipation or to charge or encumber the trust estate; (and from and after her decease, upon trust for all and singular the children or child of the said Grace living at her death,) and the issue then surviving of any child or children of the said Grace who may be then deceased, equally and absolutely ; but so that the issue of a deceased child or children, if any, shall take by representation the share or shares only which their parent or parents, if living, would have taken."

The Court below (DENNIS, J.), decreed "that the trusts created in and by the 6th clause of the last will and testament of the said William E. Hooper, deceased, and that the trusts created in and by the 12th clause thereof, in so far as they relate to the share of the estate of the testator devised and bequeathed to said petitioners for Grace Felgner, one of the daughters of said testator, and her children, are to continue as to one-half thereof until Marie Theresa Felgner, one of the children of the said Grace Felgner, arrives at the age of twenty-one years, and as to the remaining half thereof until Catherine Hooper Felgner, the other child of the said Grace Felgner, attains the age of twenty-one years, and that upon said children attaining the full age of twenty-one years respectively, they shall each be entitled to receive one-half of the said property and estate so held in trust for them, free, clear and discharged from all trusts created in and by said will.

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Argument of Counsel.

"And that in the meantime said trustees shall manage said estate and shall pay over to the said Marie Theresa Felgner, for her maintenance and support, such portion only of the net income derived from her share of said property and estate as in the judgment of said trustees or a majority of them may seem right and proper, and to pay over to Edward L. Felgner and Alcaeus Hooper, guardians of Catherine Hooper Felgner, the net income derived from her share of said property and estate."

From this decree, both the trustees and the guardians of Marie Theresa and Catherine Felgner appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Frank Gosnell* (with whom was *T. M. Lanahan* on the brief), for the trustees.

The majority of the trustees respectfully suggest that the children of Mrs. Felgner took, under the will of their grandfather, "an equitable fee simple in remainder," and that consequently the trusts do not terminate upon their attaining their majority, respectively; and they have appealed simply, so that upon the death of any one or more of their surviving sisters, they may know exactly what their duties and obligations in the premises are—the provisions in the will with reference to the shares of their other sisters being identically the same as those relating to Mrs. Felgner and her children. The learned Judge below was clearly right in holding that the trusts are to continue, *at least*, until the remaindermen, respectively, shall have attained the age of twenty-one years; and in so doing he was governed by the decision in *Denton v. Denton*, 17 Md. 403.

But we go further, and respectfully submit, that the children of Mrs. Felgner took an equitable estate in fee simple in testator's estate, and that the *trust* exists during their lives, respectively. The trust in favor of Mrs. Felgner was, that the trustees pay to her the *net income* of the estate, and

after her death "*upon trust*" for all and singular her children living at the time of her death. Nor is this term "*upon trust*" qualified by the following words "*equally and absolutely*;" they merely designate the *quantity* of the estate as distinguished from its *quality*; this is obvious, because Mrs. Felgner was only entitled to receive of the *net income* from her share of the residuary estate \$6,000 per annum; whereas her children, by the use of the words "*equally and absolutely*," are to receive all the *net income*.

By this construction these children will receive the income from a very large fortune; and at the same time hold an estate which is devisable and descendable in the same manner as a legal estate in fee simple, and which may be alienated, subject to the existing trusts, during their natural lives. *Fairfax v. Brown*, 60 Md. 50; *Gunn v. Brown* (2d appeal), 63 Md. 96; *Gunn v. Brown* (3d appeal), 23 Atl. Rep. 462.

*Thos. Ireland Elliott*, for the guardians.

It is to be noticed that, except as to the property upon which they operated, the sixth and twelfth clauses of William E. Hooper's will are practically identical. The sixth clause conveys two pieces of house property, one fee simple, the other leasehold. The twelfth clause has to do only with the residuum of the estate. But in the indicated intention of the testator, in the manner of enjoyment by the life tenant, and in the ultimate disposal of the estate, the two clauses mentioned are alike. The evident intention of the testator was to create and protect a life-estate for his daughters, with remainder to their respective children, if any, and the children of any deceased child, *per stirpes*; and in the event of failure of such children or descendants, then to the other grandchildren of the testator, either nominated by the last will of the daughter so dying, or, in case of no such nomination, then to his grandchildren generally. Effect should be given to that intention. *Fairfax v. Brown*, 60 Md. 54; *Bailey v. Love*, 67 Md. 599; *Larmour v. Rich*, 71 Md. 381; *Dulaney v. Middleton*, 72 Md. 79.

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Argument of Counsel.

The remainder, therefore, which had been contingent up to that time, became, immediately upon the death of Grace Felgner, *vested* in her said two children. *Turner v. Withers*, 23 Md. 40-41; *Demill v. Reid*, 71 Md. 188-192; *Larmour v. Rich*, 71 Md. 382. And not only did the estate vest in these two daughters upon their mother's death, but it vested in them to the exclusion of every one else, even to the exclusion of their own children, if they had then had any. *Thomas v. Levering*, 73 Md. 458-460. The single contingency with which we need concern ourselves, is the existence and survival of children of Grace Felgner at her death. Those children might die immediately afterwards, and there can be no doubt that those who would take after them, would take, not under the will, but by descent. The children of Grace Felgner, therefore, took at their mother's death, not an estate for life, but the *whole* estate, and *possession* and *enjoyment* then coalesced. *Fairfax et al. v. Brown et al.*, 60 Md. 55-58.

There is nothing in the will providing expressly for the continuance of the trust beyond the life of the life-tenant. The trustees are assigned certain duties to be performed by them in regard to Grace Felgner "during her natural life." What duties have they after her death? The trustees, and the decree appealed from, say that those duties continue for the children of Grace Felgner. But the will does not *say* so. It says that the children of Grace Felgner living at her death, and the children of any child then deceased, shall take *equally* and *absolutely*; and this *absolute* taking *then*, is only qualified to the extent "that the issue of a deceased child or children, if any, shall take by representation the share or shares only which their parent or parents, if living, would have taken." And the trust is not to see that the children take in one manner while under twenty-one years, and in another manner after that age, but that they take, upon the death of Grace Felgner, "*equally* and *absolutely*." The words "upon trust" raise no presumption of a continuance of the trust. *Mercantile Trust Co. v.*



*Brown*, 71 Md. 166; *Demill v. Reid*, 71 Md. 175; *Larmour v. Rich*, 71 Md. 369.

As to the *personalty*, the law itself declares Marie Theresa Felgner competent to take, and this Court can not imply incompetency. *Md. Code P. G. L.*, Art. 93, sec. 142; *McKim v. Handy*, 4 Md. Ch. 237; *Carpenter v. Bouldin*, 48 Md. 129. Therefore, it would seem to be indisputable that, there being no active duties to be performed by the trustees, after the death of Grace Felgner, and there being no longer any *title* requiring protection by the retention of the legal estate, the purposes of the trust have been accomplished, and there remains nothing to be done but to transfer the legal title of the *personalty* to Marie Theresa Felgner in her own right, absolutely, and to Edward L. Felgner and Alcaeus Hooper, guardians of Catherine Hooper Felgner, the legal title to the real estate having already been merged with the equitable title. *Thompson v. Ballard*, 70 Md. 17.

ROBINSON, C. J. delivered the opinion of the Court.

The questions in these appeals arise upon the construction of the sixth and twelfth clauses of the will of the late William E. Hooper. The testator died in 1885, leaving ten children, four sons and six daughters. By the sixth clause he devises and bequeaths to his four sons a leasehold lot No. 51, and a fee simple lot No. 55, on Charles Street avenue, *upon trust* to permit his daughter, Grace Felgner, to use and enjoy the same, and the *net rents* and income thereof to take during her life, without power on her part to anticipate the payment of such rents and income, or to charge or encumber the trust estate; and upon her death *in trust* for her children living at the time of her death, and their surviving issue. But should no child or descendant of his said daughter survive her, then, with power on the part of his daughter to dispose of said property by last will and testament among any one or more of the testator's surviving grandchildren, and in default of such disposition or appointment by his

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daughter, then the said portion of his estate to be divided equally between the testator's grandchildren then living, and the surviving issue of such grandchildren, absolutely.

After several specific devises and bequests, the testator, by the twelfth clause, directed that all the residue of his estate, real and personal, should be divided into ten equal parts; one equal part thereof he devised and bequeathed to each of his four sons, absolutely. The remaining six parts he devised and bequeathed to his four sons upon trust for his six daughters, in manner following:

"And as to one-tenth part of my said entire residuary estate upon trust to pay the net income thereof as it shall accrue (except as hereinafter provided) unto my daughter, Grace Felgner, during her natural life, and for her sole and separate use, without power or anticipation, or to charge or encumber the trust estate; and from and after her decease, *upon trust* for all and singular the children or child of the said Grace living at her death, and the issue then surviving of any child or children of the said Grace who may be then deceased, equally and *absolutely*; but so that the issue of a deceased child or children, if any, shall take by representation the share or shares only, which their parent or parents, if living, would have taken."

"In case of any one or more of my said six daughters dying without leaving issue surviving, then I give, devise and bequeath the tenth part or tenth parts of my residuary estate devised above in trust for the benefit of such, my daughter or daughters so dying without surviving issue, unto all and every my grandchildren who shall survive such my daughter or daughters so dying, and the then surviving issue of any of my grandchildren who may have previously departed this life leaving such surviving issue, absolutely and equally *per capita* as to such surviving grandchildren, but by representation as to such issue of deceased grandchildren, who are to take by substitution only what their respective parents would have taken had they survived."

Grace Felgner, the life-tenant, died in 1893, leaving two

children, Marie Theresa, about nineteen years, and Catharine, about thirteen years of age. These were her only children, and both of them were living at the death of their grandfather, William E. Hooper, the testator.

The plain and obvious intention of the testator was to create and protect a life-estate for his daughter, Grace Felgner, with remainder to her children, if any, and the children of any deceased child *per stirpes*; and in the event of the failure of such children or descendants, then to the other grandchildren of the testator, either nominated by will, or in case of no such nomination, then to his grandchildren generally. The trustees, it is clear, therefore, took a legal estate in the trust property, the *equitable life-estate* being in Grace Felgner, the testator's daughter, and the *equitable remainder* being in her two children, then living, subject to the contingency of their death before their mother, and subject in case they survived her, to be diminished by the birth and survival of other children of their mother. And the mother having died, leaving as her only children or descendants Marie Theresa and Catharine, these two children of the life-tenant answer the description of those entitled in remainder; they answer that description at the time of the happening of the contingency, namely, the death of their mother, without other children or descendants, and they are therefore the only persons who could ever have answered it. And this brings us to the real question in this case. Does the trust created by the will continue after the death of Grace Felgner, the life-tenant, or does the property upon her death vest absolutely in her two daughters, both of whom were living at that time? There is nothing, it must be admitted, in the will, providing expressly for the continuance of the trust beyond the life of Grace Felgner, the testator's daughter, nor is there anything from which it can be fairly implied that the testator meant that it should continue after her death. During her life, certain duties are imposed upon the trustees, the language of the will being, "Upon trust to pay the net income thereof, as it shall accrue (except as herein-

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after provided), unto my daughter, Grace Felgner, during her natural life, and for her *sole and separate* use, without power of anticipation or to charge or encumber the trust estate, and from and after her decease upon trust for all and singular the children or child of the said Grace living at her death, and the issue *then* surviving of any child or children of the said Grace, who may be then deceased, *equally and absolutely.*" The testator does not say that the trustees shall after the death of his daughter receive and pay the net income of the trust property to her children or descendants living at that time, for their sole and separate use, nor does he impose any limitation upon the power of the remaindermen to charge or incumber the estate. After her death they are to hold the property in trust for all and singular the children or child of the said Grace living at her death, *equally and absolutely.* Where an estate is given to trustees and their heirs upon trust to receive and pay the net income thereof to one for life, and upon his death, in trust for all and singular his children and the issue of such children living at the death of the life-tenant, the trust ceases upon the death of such life-tenant, for the reason that it remains no longer an active trust. In such cases the Statute of Uses executes the use in those who are limited to take upon the expiration of the life-estate; or, in other words, the statute transfers the use into possession by converting the estate or interest of the *cestui que trust* into a legal estate, thereby determining the intermediate estate of the trustee. As to the real estate, it is clear, therefore, that upon the death of Grace Felgner, the life-tenant, the trustees, having no longer any active duties to perform, the legal estate was executed under the statute in her two children, and the trust was thereby at an end.

Now, as to the personal property, though it has been said that the object of the statute was to abolish all uses and trusts, yet, as the language of the statute was: "*Whenever any person is seized,*" &c., the English Courts, by a strict construction, held that it did not apply to personal

property, for the reason that one could be said to be "*seized*" of a mere *chattel interest* interest. At the same time, however, it may be considered settled, that a trust in regard to personal property will continue so long and no longer, than the purposes of the trust require. And that when all the objects of the trust have been accomplished, the person entitled to the beneficial use is regarded as the absolute owner, and as such, entitled to the possession of the property. Under this will the objects and purposes of the trust, namely, that the trustees should pay the net income to Grace Felgner during her life, and for her sole and separate use, without power of anticipation, &c., were fully accomplished, and upon her death the trustees had no longer any active duty to discharge. And this being so, her two children being entitled to the ultimate use, became the absolute owners of the property.

Nor can we agree with the Court below, that the fact of the minority of one of the *cestui que trusts*, is any reason why the trust should continue until she is *sui juris*. The language of the Court in the concluding part of the opinion filed in *Denton v. Denton*, 17 Md. 403, may be construed, we admit, as supporting this contention. In that case certain negroes, slaves, were conveyed by deed of marriage settlement to a trustee to hold to the use of the husband and wife during their joint lives, and upon the death of the husband, then to the use of the wife, her heirs and assigns forever. In delivering the opinion of the Court, Judge BAR-TOL says: "Looking at the provisions of the marriage settlement in this case, we find no sufficient ground for saying that it intended the trust to terminate and the estate to be divested on the death of Mrs. Denton; on the contrary, the obvious intent and purpose was that the trust should continue for the benefit of her child or children, and the title of the trustee was meant to continue, with the obligation and duty to preserve the property for the benefit, at least until they should become *sui juris*."

Whatever may have been the language in the marriage

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settlement in that case, from which the Court found that it was the intention of the settlor that the trust should continue after the death of Mrs. Denton, with the obligation and duty imposed on the trustee to preserve the property for the benefit of her children until their arrival at age, it is sufficient to say that no such intention can be found from the language of the will before us. We find nothing from which it can be inferred that the testator meant the trust to continue after the death of his daughter, the life-tenant.

The purposes of the trust having been accomplished, and the trustees having no longer any active duties to perform, and Marie Theresa Felgner, one of the daughters, being over eighteen years of age, she is entitled in her own right to her share of the personal estate. And as to the other daughter, Catherine Hooper Felgner, she has, the record shows, guardians legally appointed and qualified, and this being so, such guardians are entitled to receive her share of the personal estate. There can be no reason why the trust should continue merely to allow the trustees to receive the income and pay it over to her guardians. In the case of an ordinary bequest to an infant, the guardians are the proper persons to take the property bequeathed, and where a trust has terminated, and one who becomes thereby the absolute owner of the property is a minor, there is no reason why the guardian should not take and hold the property for the benefit of his ward.

*Decree reversed and cause remanded  
in both appeals.*

(Decided December 18th., 1894.)

JACOB G. ROHR, GENERAL MANAGER, ETC., vs. JOHN  
T. GRAY, CLERK, ETC.

*License Taxes—Constitutional Law.*

A license required to be paid by certain classes of traders is not a direct tax on property within the first clause of Art. 15 of the Bill of Rights, but is a tax on the business of the trader under the last clause of that Article.

The Act of 1894, ch. 113, requiring traders in Baltimore City, who carry on business in two or more places not adjoining one another, to take out a separate license for each place, graded according to the amount of merchandise kept on hand, is valid.

Appeal from the Court of Common Pleas. The appellant filed a petition in said Court, alleging that he had applied to the appellee for a single license authorizing the corporation represented by the appellant to carry on business at thirteen different stores in Baltimore City, which application was refused, and the petitioner prayed for a writ of *mandamus* directing the Clerk of said Court to issue such license. The appellee relied in his answer upon the Act of 1894, ch. 113, which is set forth in the opinion of the Court. The appellant demurred to the answer, and the Court below (PHELPS, J.) overruled the demurrer and dismissed the petition. The appellant then appealed by a petition assigning errors, in the nature of a petition for a writ of error.

The cause was argued before BRYAN, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*Howard Bryant*, for the appellant, cited: *Wailes v. Smith*, 76 Md. 469; *Cooley, Const. Lim.*, 481-485, 611; *State v. R. R. Co.*, 45 Md. 377; *Lucas v. Lottery Comrs.*, 11 G. & J. 506; *St. Louis v. Spiegel*, 75 Mo. 146; *S. C.*, 90 Mo., 593; *State v. C. & P. R. R. Co.*, 40 Md. 50; *Cooley on Taxation*, 169, 599; *Disrael's Appeal*, 62 Pa. St. 491; *Vansant v.*

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*Harlem Stage Co.*, 59 Md. 330; *Sayre Brough v. Phelps*, 148 Pa. St. 488; 20 S. W., Rep. 85.

*Charles W. Field*, for the appellee, cited: *Fell v. State*, 42 Md. 89; *School Comrs. v. Allegany Co.*, 20 Md. 449; *Cooley on Taxation*, 570; *Cooley, Const. Lim.*, 479-481, 611; *State v. County Comrs.*, 29 Md. 516; 2 *Desty on Taxation*, 1385; 1 *Ibid*, 305; *University v. Williams*, 9 G. & J. 234, note (e); *State v. P. W. & B. R. R. Co.*, 45 Md. 376-381; *State v. C. & P. R. R. Co.*, 40 Md. 49-52; *Tyson v. State*, 28 Md. 585; *Corson v. State*, 57 Md. 264; *Vansant's case*, 59 Md. 330.

BRISCOE, J., delivered the opinion of the Court.

The question presented in this case arises on demurrer and involves the constitutionality of the Act of 1894, chapter 113, entitled, "An Act to add a new section to Article four, Code of Public Local Laws, title, "City of Baltimore," subtitle, "Licenses," regulating the issuing of licenses to traders occupying one or more places of business in said city." The Act provides, that "there shall be entered in writing by the Clerk of the Court of Common Pleas, upon the face of all licenses obtained by individuals, firms or corporations to conduct business as traders in the city of Baltimore, the name of the street and number of the house or building, or if there be no number a full designation of the location of said house or building for which a license is applied for; and each license shall only authorize the transaction of business in one house or building unless the individual, firm or corporation shall occupy more than one adjoining house or buildings, and said houses or buildings have open, direct, internal communication with each other; in that case one license will cover transactions in said adjoining houses or buildings so arranged and occupied; provided always, that any firm, individual or corporation may obtain any number of licenses to conduct business in any number of separate places of business in said city, upon



paying for each license a sum graded according to the amount of stock or merchandise generally kept on hand or proposed to be kept on hand at the principal season of sale in said respective places of business according to the Code of Public General Laws."

On the 27th of April, 1894, the appellant, Jacob G. Rohr, General Manager of the Consumers' Meat Company, a body corporate of the State of New Jersey, but doing business in the city of Baltimore, applied to the appellee, the Clerk of the Court of Common Pleas of Baltimore, for a single trader's license to conduct business at thirteen different, unconnected stores, alleging that the total value of all the stock and merchandise kept on hand at the principal season of sale in all thirteen of these stores, collectively, was six thousand dollars. And it was conceded at the hearing, that but for the Act of 1894, ch. 113, the clerk would have been authorized to grant the license as applied for, as provided by the Public General Laws of the State, relating to traders' licenses.

The only question, then, in this case, is as to the validity of the Act of 1894, ch. 113. It is insisted that the law is in conflict with that part of the 15th Article of the Bill of Rights, which declares "that every person in the State or person holding property therein ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property." This Article of our Declaration of Rights has been so often and so recently considered by this Court, that the question here raised can hardly be considered at the present time, as *res nova*. There is but one construction in the whole line of these decisions.

While it is true that every person in the State, or person holding property therein should contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property, and that all taxes levied upon property should be equal and uniform according to its actual value, yet the framers of the Constitution also declared, that in addition to taxes on

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property other taxes might be levied "for the good government and benefit of the community." A license tax as laid or imposed here, is not a direct tax on property within the meaning of the first clause of the 15th Article of the Bill of Rights, but is a tax on the business or occupation of the trader or licensee, under the last clause of that Article. The power of a State, says the Supreme Court, to impose a tax, in the way of license upon pursuits and occupations within its limits, has never been seriously questioned. *License Tax Cases*, 5 Wall. 472; *Welton v. Missouri*, 91 U. S. 278.

Without stopping, then, to review the many cases where this question has been passed upon, we content ourselves with a simple reference to some of them. These clearly show that the act in question is free from the constitutional objection urged against it. *State v. P. W. & B. R. R. Co.*, 45 Md. 380; *State v. C. & P. R. R. Co.*, 40 Md. 41; *Tyson v. State*, 28 Md. 585; *Corson v. State*, 57 Md. 262; *Wells v. Coms. of Hyattsville*, 77 Md. 125; *Cooley on Taxation*, 570; 1 *Desty on Taxation*, 305; 2 *Desty on Taxation*, 1385; *Cooley's Const. Lim.* 616.

Being of opinion that the Act of 1894, ch. 113, is constitutional and valid, the order of the Court overruling demurrer and dismissing petition for *mandamus* will be affirmed with costs.

*Order affirmed with costs.*

(Decided December 18th, 1894.)

THE GLYMONT IMPROVEMENT AND EXCURSION COMPANY *vs.* WASHINGTON N. TOLER.

*Corporations—Acceptance of Charter—Changing one Corporation with Another—Acquiescence of Shareholder—Surrender of Stock—Organization without the State.*

Where a corporation is formed under the general law, no further proof is required to show that the persons who signed the articles and applied for the charter have accepted the same, than their compliance with the provisions of the statute.

The stockholders of a certain corporation, instead of amending their charter in the manner agreed upon by all of them, including the defendant, applied for and obtained a new charter, identical in terms with the proposed amendment, and differing but little from the old charter. In adopting the new charter, the trustees were directed to convey the property of the old company to the new one upon the latter's assuming all liabilities and issuing to each shareholder of the former company a certificate of stock in the new company equal to his paid up stock in the old company. The new company was first formally organized in the District of Columbia, but subsequently held meetings, &c., in Maryland. Defendant, the owner of certain shares of stock in the old company, refused to exchange them for stock in the new company, but he attended stockholders' meetings, took part in the discussions, and objected to the exchange of his stock on account of his opposition to some of the officers of the new company. *Held,*

- 1st. That the transaction in this case did not amount to a sale of the property of one corporation to another foreign corporation in exchange for its stock.
- 2nd. That although the new company may have been first organized in the District of Columbia, yet a subsequent organization in this State and operations under the charter render the same valid.
- 3rd. That by his conduct the defendant must be treated as having assented to the acceptance of the new charter by the stockholders, with the knowledge that such acceptance was upon the condition that certificates of stock under such charter were to be issued in lieu of the former stock.
- 4th. That the defendant should be ordered to surrender his certificate of stock in the old company, and accept in lieu thereof a like certificate in the new company.

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Neither the directors nor a majority of the stockholders of a corporation have the power to make fundamental changes in the charter, inconsistent with the objects for which it was granted; nor have they the power, upon the dissolution of the company, to sell its property to another corporation and compel the shareholders to take stock in that company.

Appeal from the Circuit Court for Charles County. The bill of complaint in this cause, filed by The Glymont Improvement and Excursion Company against the appellee, set forth the following facts: On November 21, 1883, The Upper Glymont Improvement and Excursion Company was incorporated under the general law, and purchased upwards of one thousand acres of land, lying on the Potomac River, in Charles County. In March, 1888, this company, for the purpose of amending its charter by changing its name from "The Upper Glymont, etc., Co." to "The Glymont, etc., Co.," and to make more explicit its powers, called a general stockholders' meeting, at which the new charter was agreed upon by a vote of more than two-thirds of the shares of stock. The bill further alleged that it was agreed by the defendant that all the stockholders of the old company should surrender their stock to the new company, and receive in lieu thereof the stock of the new company in shares and amounts equal to the old company's stock held by them; that all of the shareholders of the former company accepted stock in the new company, except the defendant, who, notwithstanding his assent to said transaction, contended and openly proclaimed that the plaintiff had no legal existence and no title to the property in question, because the surrender of the old company's charter and the transfer of its property to the new one, was not made with the unanimous consent of the stockholders of the former company. It was averred that the conduct of the defendant threw a cloud upon the plaintiff's title to the property, and prevented them from managing the same advantageously and from selling the remaining shares of the stock. The prayer of the bill was that the defendant be decreed to bring the certificate of stock

in the old company held by him to the plaintiff to be cancelled, and accept a certificate for a like number of shares in the new company, and that he be enjoined from transferring the shares then held by him, etc. The defendant denied that he had assented to the surrender of the old charter and the acceptance of the new one. The purport of the evidence upon this point is set forth in the opinion of the Court. The Circuit Court for Charles County (BROOKE, J.), made a decree dismissing the bill of complaint.

The minutes of the Upper Glymont Company showed that a special meeting of the stockholders was held on May 20, 1886, at which the defendant submitted an amended charter almost identical with that subsequently adopted; and that at a meeting of the stockholders at Glymont on April 7, 1888 (the defendant, however, not being present), the following preamble and resolutions were unanimously adopted, more than two-thirds of the shares of stock being voted: "*Whereas*, a special meeting of the stockholders of the Upper Glymont Imp. and Ex. Co. was held at Glymont, Md., May 20, 1886, for the purpose of considering certain proposed amendments to the charter; and, *whereas*, at a special meeting of the trustees, held June 10, 1886, a committee appointed at the special meeting of stockholders held in May, reported that they had submitted the suggested amendments to Judge Frederick Stone, who had approved the same, but recommended that, instead of amending the present charter, it would be better to draft and adopt a new one; and, *whereas*, in compliance with said suggestion, a new charter was prepared but never fully executed; and, *whereas*, on the 29th of December, 1887, a special stockholders' meeting was held at Glymont, Md., when said new charter and the suggested amendments were duly considered and concurred in; and, *whereas*, the necessity and the desirability of amending and changing the charter so long entertained, and so frequently expressed by the holders of stock represented at each meeting, still exists; therefore, *resolved*, that the stockholders of the Upper Glymont Imp. and Ex. Co.,

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being lawfully called and duly assembled, do concur in the previously expressed desire to amend and change the charter of the company, and do hereby adopt the new charter presented for our consideration. *Resolved*, that the trustees are hereby authorized and instructed to convey the land and all its betterments and improvements to the Glymont Improvement and Excursion Company ; provided said company shall assume all debts and liabilities whatsoever of the Upper Glymont Imp. and Ex. Co., and agree to issue to each stockholder of this company certificates of stock in the new company equal to the amount of paid up stock owned by him in the old company."

The first meeting of the charter members of the new company was held at Glymont, but a quorum not being present, an adjourned meeting was held in Washington, D. C., on April 9, 1888, at which officers for the ensuing year were elected, and the offer of the Upper Glymont Co. to transfer its property upon the above-mentioned terms accepted. In April, 1889, and in the following years, the annual meetings of the new company were held at Glymont, and the officers then elected.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

· *Marion Duckett*, for the appellant.

If we consider the purposes for which the plaintiff obtained its charter, the circumstances and manner under and by which it was obtained, we think there was no occasion for its acceptance as though they were acquiring corporate franchises from the State for the first time. There was simply, solely and purely an attempt to amend the old charter, and the only question really is, or was, whether this was done with the express or implied consent of the stockholders of the old company.

When a particular charter is granted after having been applied for acceptance, may be presumed from such *previous*

*application.* Indeed it would seem that no acceptance would be required in the latter case, since the consent of the grantees was given in advance. *Middlesex & Co. v. Davis*, 3 Metc. 138; *Smead v. R. R. Co.*, 11 Ind. 104; *Hammond v. Straus*, 53 Md. 12. Applying the facts to the last principle, what object could there be in requiring the incorporators, S. A. H. McKim and others, to manifest other evidence of their acceptance of the certificate of incorporation when they were the individuals *who petitioned* for the said certificate, signed, sealed, acknowledged it, and presented it for the approval or certification of the Circuit Court.

Could the Upper Glymont Co. have its charter amended in the manner and to the extent it did without the consent of the defendant or the unanimous vote of its shareholders? I contend it could. *Morawetz Corp.*, secs. 53, 198; *Cook on Stockholders*, sec. 499. The cases announcing the doctrine that the unanimous consent of the stockholders must be had to an amendment of the charter, or indeed, surrender of the charter, are cases in which it appeared to the Courts that the amendments or the surrender, very seriously jeopardized the interests of these dissenting stockholders, as by inserting in the charter some enterprise involving a different or greater risk, or large expenditures of money, or great uncertainty in the feasibility of the plan itself, or consolidation with other companies with a view to saddle more debt upon the old company, or change its original purpose, or obliteration of its stock by merger, and the like; (*Beach*, vol. 1, secs. 41 and 42; 36 Md. 491; *Morawetz*, secs. 77, 79, 80, 82, (1882); but no one of which features do we find involved in the amendment to the charter of the old company, nor can we conceive how the defendant's stock is imperilled or rendered less valuable by reason of the change, or any clause or article in the new charter. The name is the same with the word upper out; purposes and object, same; place, same; capital stock, same; duration, same; property, same; directors, same; debts, same; and new stock issued for the old.

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Argument of Counsel.

Where the amendment is not fundamental, it may be accepted by the majority. *Buffalo and New York City R. R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Dayton, etc., R. R. Co. v. Hatch*, 1 Disney, 84; *Commonwealth v. Cullum*, 13 Penn. St. 133; *Cooke*, sec. 499, note 2. Whether an amendment materially changes the corporate plans or not, is a question of law for the Court, upon facts ascertained by the jury. Accordingly, each case is to be decided according to the peculiar circumstances of that case, and no general rules can be laid down which will apply to all cases. *Cooke*, page 485.

There is no doubt that, in law, a stockholder may bind himself in his dealings with a corporation as well by his acts, behavior and remarks, as he could by a formal vote or a written declaration. (*Beach on Corporations*, vol. 1, page 81, sec. 43; *Stokes v. Detrick*, 75 Md. 263, and 75 Md. 315; *Morawetz*, secs. 79, 80, 82, 1882.) A dissenting stockholder may be estopped from objecting to an amendment by his expressed or implied acquiescence therein, and there are certain circumstances by which his silence will operate as a bar to any subsequent objection. (See also vol. 2, sec. 431, *Beach on Corporations*.) It is not just that a shareholder, knowing an act of the majority to be unauthorized, should lie by and reserve an option to repudiate an act in case of loss, or to enjoy the benefits of it, should it turn out well. Fairness in such cases demands that a dissenting stockholder should make known his dissent immediately, and take the proper steps to restrain the majority from exceeding the powers conferred upon them. And if a shareholder fails to take the trouble to inquire into the affairs of the corporation, of which he is a member, or to attend its meetings, it seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority. (*Morawetz*, sec. 80; *Cook*, secs. 685, 686 and notes.) If we read the citations from the evidence in the 14th paragraph herein, and then consider that the



defendant was a stockholder of the Upper Company during the whole time when the amendments were being discussed and assented to; when the surrender was actually made; when the ratification of the charter was had, April 7, 1888, by the votes of the old company; when he has seen and known the plaintiff company to be spending annually hundreds of dollars in paying interest of the \$13,000 incumbrances on this property, annual taxes, repairs on its houses; wharves and property generally, details of which are set out in the financial reports of the company, and has never sued them or attempted to restrain them, it is clear that the appellant is entitled to the relief asked for.

*O. D. Barrett and Adrian Posey*, for the appellee.

The only possible ground on which the appellant could claim a decree as prayed for, would be on that of an estoppel as against the appellee, Toler; that is, that the appellant company had been led to do what it has in the premises, by reason of the action of the appellee, Toler, before that action was taken. The appellant has totally failed to show by the evidence, that its action has at any time been based upon any prior word, act or deed of the appellee. The appellee took no part in the organization of the appellant company. He never advised it; he took no part in any transfer of property to said company; he took no part on behalf of the appellant company in advising the acceptance of said property by said company, and said company has never been led by him to do, or leave undone, any act or thing whatever; and consequently there is no such thing as estoppel in this case.

No corporation can perform any corporate act outside of the jurisdiction of the State or Territory under whose laws the corporation is created, and the organization of a corporation by the corporate members designated to manage the affairs of the company for the first year is a corporate act which must be performed, if at all, within the jurisdiction of the State or Territory under whose laws the corporation is

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Argument of Counsel.

created. In support of the above point, counsel for appellee rely upon the following authorities: 1 *Beach on Private Corporations*, secs. 285, 286; *Smith v. Silver Mining Co.*, 64 Md. 85; *Miller v. Ewer*, 27 Me. 509; *Bank of Augusta v. Earle*, 13 Peters 519; *Wood v. Hydraulic Co.*, 45 Ga. 35; *Hilles v. Parrish*, 14 N. J., Eq. 380; *Aspinwall v. Ohio R. Co.*, 20 Ind., 492; *Freeman v. Machias Water Power Co.*, 38 Me., 343; *Ormsby v. Vt. Copper Co.*, 56 N. Y. 623; *Merrick v. Brainard*, 38 Barbour, 574; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339; *Farmham v. Blackstone, Corp.*, 1, Sumn. 46; *Day v. Newark Mfg. Co.*, 1 Blachf. 628; *Plimpton v. Bigelow*, 93 N. Y. 592; *Stephens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Merrick v. Van Santwood*, 34 N. Y. 298; *Richwald v. Com. Hotel Co.*, 106 Ill. 439.

The attempted transfer of the property of the Upper Glymont Improvement and Excursion Company to the Glymont Improvement and Excursion Company failed of its object, in that it was done, if done at all, without any valid or legal consideration. (a.) At the time of the passage of this resolution, to-wit, April 7, 1888, the Glymont Improvement and Excursion Company was unorganized, and it then had no officers or agents who could bind the company to give any consideration for the transfer attempted to be made to it. (b.) "Said company to assume all debts and liabilities now due, in consideration of this transfer." There is here no specification as to what debts and what liabilities the Glymont Improvement and Excursion Company were to assume. The language is not that said Glymont Improvement and Excursion Company should assume all debts and liabilities of the Upper Glymont Improvement and Excursion Company. (c.) By the insertion of the words "now due," the language is not applicable to the liabilities in general of the Upper Glymont Improvement and Excursion Company, as the majority of the indebtedness of that company, to-wit, a promissory note made in September, 1886, for \$8,000, payable in two years from date, had not then become due.

When the property of one corporation is sold to another, no shareholder of the former can be required, without his own consent, to accept the stock of the latter as his share of the proceeds of sale. *Beach on Private Corp.* sec. 359; *Mason v. Pewabic Mining Co.*, 133 U. S. 50; *Taylor v. Earle*, 8 Hun. 1; *Frothingham v. McArdle*, 6 Hun. 366; *McCurdey v. Meyer*, 44 Pa. St.

ROBINSON, C. J., delivered the opinion of the Court.

The Upper Glymont Improvement and Excursion Co. was incorporated in 1883, under the general incorporation law, with a capital stock of \$25,000, divided into 1,000 shares, of the par value of \$25 each. The object of its incorporation was to buy a tract of land on the Potomac River, at or near Glymont, in Charles County, about twenty miles below Washington, and to erect thereon hotels, cottages and other buildings necessary and suitable for a summer resort; also for the purpose of cultivating flowers, growing vegetables and agricultural products.

Soon after its organization the company bought a tract of land called "Upper Glymont," and then it bought another tract, "Lower Glymont," the two tracts containing about one thousand acres. On the property thus purchased it has expended large sums of money in buildings and other improvements, in order to make it an attractive summer resort. After the purchase of the Lower Glymont tract, it was deemed advisable to change the name of the company by leaving out the word "Upper," thus making the name "The Glymont Improvement and Excursion Company;" and also to strike out the clause in the charter forbidding the sale of intoxicating drinks on the property. And for this purpose an amended charter was prepared by Toler, the defendant, then one of the directors, and was acknowledged by him and six other corporators, as required by the Code, before the proper officer, and submitted by him to the stockholders at a special meeting, held 20th May, 1886. It does not appear that any definite action was had in re-

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gard to the amended charter at this meeting, but at a meeting of the directors on June 10th, of the same year, the committee on charter reported that they had submitted the amended charter to Judge Stone, one of the Judges of the Circuit Court, as required by the Code ; and that he, whilst being of opinion that the amendments were in conformity with the statute, suggested it might be better to adopt a new charter, and this suggestion was concurred in by the directors. Instead, then, of amending the charter, articles of incorporation were signed by the directors for the incorporation of "The Glymont Company," and having been duly acknowledged by the parties signing the same, they were submitted to Judge Stone, who thereupon certified that they were in conformity with the provisions of the law authorizing the formation of said corporation ; and on the 17th March, 1888, they were filed for record in the Clerk's office of the Circuit Court for Charles County. This charter, which is called the new charter, *is identical in terms and provisions with the amended charter* prepared, signed, acknowledged and submitted by the defendant at the stockholders' meeting of May 20th, and it is substantially the same as the charter of 1883, the only alterations being in the name of the company and the omission of the clause forbidding the sale of intoxicating drinks. The reason for filing new articles of incorporation, instead of an amended charter, was the fact that the whole capital stock had not been taken, and it was deemed best to avoid any trouble that might arise under the 64th sect. of Art. 23 of the Code, which provides that the capital stock of a corporation shall be paid within four years from and after its incorporation, "or such corporation may be dissolved." After the articles of incorporation had been filed of record, a special meeting of the stockholders was called to be held April 7th, 1888, at Glymont, where the principal office of the company was located ; and at this meeting, the charter, after full consideration, was adopted without a dissenting vote, more than two-thirds of the shares of stock having been voted.

And in adopting the charter it was further resolved, "That the trustees are hereby authorized and instructed to convey the land and all its betterments and improvements to the Glymont Improvement and Excursion Company, provided said company shall assume all debts and liabilities whatsoever of the 'Upper Glymont Improvement and Excursion Company,' and agree to issue to each stockholder of this company certificates of stock in the new company, equal to the amount of paid up stock owned by him in the old company."

There being only two charter members of the new company present, the meeting adjourned to meet at the branch office in Washington, on the 9th April. At this adjourned meeting, held in Washington, the directors formally organized by electing a president and other officers.

The defendant was the owner of 64 shares of stock of the "Upper Glymont Company," and he refuses to exchange this stock for the stock of the "Glymont Company," because the charter of 1888, he says, has never been accepted, and the latter company has no power, therefore, to issue certificates of stock; and, secondly, because it has no right to compel him, a dissenting stockholder, to exchange his stock for the stock of that company.

The acceptance of the charter is necessary, of course, to the corporate existence of every corporation, and for the reason that the corporators are not obliged to assume the responsibilities and discharge the duties imposed by the charter without their consent. It is well settled, however, that it is not necessary, even when the charter is granted by special act of the Legislature, to prove such acceptance by a formal vote of the corporators; on the contrary, it may be inferred from the exercise of corporate acts by them under the charter.

In this case, however, we are not dealing with a charter granted by a special act of the Legislature, but one created under the general incorporation law. And this law provides, in the first place, that any five or more persons who may

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desire to form a corporation shall make, sign, seal and acknowledge before some person competent to take the acknowledgement of deeds, a certificate in writing, in which shall be stated, &c. And then it provides that it shall be the duty of the persons executing the same, to submit it to one of the Judges of the Judicial Circuit within which the principal office shall be located, in order that he may determine whether the certificate is in conformity with the law, "and if he shall so determine, he shall certify his said determination upon said certificate, which shall thereupon be recorded in the office of the Clerk of the Circuit Court for the county in which the principal office of said corporation shall by the terms of the certificate be located." And then it further provides, "that when the said certificate shall have been recorded, the persons who have signed and acknowledged the same and their successors, shall, according to the objects, purposes, articles, conditions and provisions in said instrument contained, become and be a *body politic and corporate in fact and in law*, by the name stated in such certificate."

So, upon compliance with these provisions, the persons who have signed and acknowledged the articles of incorporation, *thereby become a corporate body*, by the name stated in the articles. It would be idle, under such circumstances, to require further proof that the incorporators had accepted that which they had in express terms applied for, and to obtain which they had complied with all the requirements of the law.

But then, it is said, there must not only be an acceptance of the charter, but the company must be organized in the State where the charter was granted; and the argument is, that inasmuch as the plaintiff company was organized by the directors in Washington on the 9th April, 1888, there is no proof of their acceptance of the charter and organization of the company in this State. To this we cannot agree. There is abundant proof throughout this record of the acceptance and organization of the company in this

State, independent altogether of the organization in Washington. It shows that from 1886, when the company was incorporated, down to the filing of this bill in 1892, the corporators and their successors have exercised corporate rights of every kind under the charter; that they have issued certificates of stock under the seal of the company; that they have expended money in further developing and improving the property; and that a board of directors has been annually elected by the stockholders at Glymont, in this State; and that the directors thus elected have controlled and managed all the property and affairs of the company.

The defendant's second contention is equally untenable. We agree that neither the directors nor a majority of the stockholders have the power to make *fundamental changes* in the charter, foreign and inconsistent with the objects and purposes for which it was granted. We agree that they have no power upon the dissolution of the company by the expiration of the time limited in the charter for its corporate existence to sell its assets at a fixed value to another corporation, and compel the shareholders to take stock in that company at a valuation fixed by that company. And we agree, too, that they have no power by their own act to terminate the existence of the corporation, and then transfer its property to a corporation in another State, and take in payment therefor stock in the foreign corporation. And it is unnecessary, therefore, to consider the several cases relied on by the counsel for the defendant, in support of these principles. *Mason v. Pewabic Mining Co.*, 133 U. S. 150; *Taylor v. Earle*, 18 Hun. 11; *Frethingham v. McArthur*, 6 Hun. 336; *Morawetz Corp.*, 415. It is sufficient to say that these cases and the principles on which they were decided have but little, if any, application to this case. No fundamental changes have been made in the charter of 1883. The objects and purposes of that charter, the property, the capital stock and the number and value of the shares, are all the same as in the charter of 1885, the only changes or alterations being the substitution of "Glymont"

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for "*Upper Glymont*," and the omission of the clause forbidding the sale of intoxicating drinks. Nor has there been a *dissolution* of the company, in the sense in which that term is used, either by the expiration of the time fixed in its charter, or from any other cause, nor has there been a sale of its property to another and foreign corporation in exchange for the stock of that corporation.

But even conceding, for the purposes of this case, that the charter of 1888 is to be considered as a new charter in every sense, and that it differs fundamentally from the original charter, the proof shows beyond question, it seems to us, that the defendant, by his own acts and conduct, must be held as having *acquiesced* in the acceptance of the new charter, and this, too, with full knowledge that it had been accepted by the stockholders at the April meeting in 1888, without a dissenting voice, and upon the express condition that the new company should assume the debts of the old company, and issue certificates of stock in lieu of the stock held by the shareholders in the old company—the consideration for which being the transfer of the property from the old to the new company. And although the defendant has refused to exchange his stock, the proof shows that such refusal was not because he had any objections to the charter itself, or its acceptance, for it is identical in terms and provisions with the amended charter which he himself had prepared and signed, but because he objected personally to some of the directors and officers, and also to the management of the company. To more than one witness he expressed his willingness to exchange his stock, provided he could succeed in electing a new board of directors, and when his last effort, in April, 1891, to change the management failed, he wrote to the plaintiff insisting that it should buy his stock at twenty dollars per share, and if it refused he threatened all this unprofitable and, as it seems to us, unnecessary litigation. All this, the proof, we think, fully sustains. The witnesses on the part of the plaintiff, its president, secretary, directors and others, all testify that



the defendant not only attended the stockholders' meeting, held for the purpose of considering the best means of promoting the interests of the company, but took an active part in the discussions. And though he criticised and found fault with the management, he never, either in these discussions or in private conversation with these witnesses, with one of whom, at least—Mr. Bigelow—he was on intimate terms, made any objection to the charter or its acceptance at the stockholders' meeting in 1888. And the proof further shows, that prior to the April election, 1891, for directors, the defendant was active in getting up a ticket in opposition to their existing board; that he suggested to other stockholders the necessity of getting proxies, and contributed to the expense of printing these proxies, and after they had been obtained, he, together with other stockholders, tabulated the vote in order to ascertain whether they had a majority of the shares of stock. And when the election took place at Glymont he attended the meeting, took part in the discussion, was present when the proxies were voted, and afterwards, when the vote was announced, he insisted that the proxies had not been properly counted. This testimony is substantially corroborated by Messrs. Metzger and Porter, the defendant's own witnesses. Mr. Metzger says the defendant attended some of the meetings of the stockholders in Washington, and took part in the discussions, and urged the members to come together, and show more interest in the company, and change the trustees, or file a bill in equity to make the old officers account for their mismanagement. That prior to the annual election in 1891, witness went to defendant's house, and there they made a tabulation of the proxies which had been obtained, in order to ascertain whether they had votes enough to elect a new board of directors, and that the defendant attended the April election and was present when the votes were counted. That in his conversations with the defendant, his objections to the exchange of his stock were on the ground of the management of the

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company and his opposition personally to some of the directors and officers, and that he had expressed his willingness to make the exchange, provided he could succeed in electing a different board.

In addition to this oral testimony, the defendant, in a letter to Mr. Kefauver, dated Jan. 21st, 1889, says: "I have just attended a large gathering of the stockholders of the Glymont Company," and "as a fellow stockholder," wants to know whether Mr. Kefauver intends to press the collection of his mortgage of \$8,000 on the property belonging to the Glymont Company, as was announced at "*our meeting*." Mr. Kefauver was at that time a *stockholder in the plaintiff company*, and defendant addresses him as a "*fellow stockholder*," and the meeting which he had just attended was a meeting of the stockholders of that company, and which he refers to as "*our meeting*." And in a subsequent letter, of June 10th, 1891, after the April election, at which he had failed in turning out the old directors, addressed to the plaintiff, the defendant insists that the company shall buy his stock at twenty dollars per share, or take the consequences of an expensive litigation and the exposure of the management of the affairs of the company.

In answer to all this, the defendant, whilst admitting that he had attended the stockholders' meetings and had taken part in the discussions, says that he did so at the request of the stockholders and for the purpose of protecting his own interests as a stockholder in the old company, and that he never assented to or acquiesced in the acceptance of the charter of 1888. But his claims as a *dissenting stockholder* are not to be adjudged and determined by his *mental reservations*, but by his own *acts and conduct*, and by these acts he must be considered and treated as having assented to the acceptance of the new charter by the stockholders, and with the knowledge that such acceptance was based upon the condition that the plaintiff should issue certificates of stock to the shareholders under the charter of 1888, in lieu of the stock held by them. And this refusal to exchange

his stock was not because he had any objections to the new charter, which is identical in its terms and provisions with the amended charter which he himself had prepared and submitted to the stockholders in 1886. So there is no ground upon which the defendant's contention can be sustained.

*Decree reversed and cause remanded  
in order that a decree may be passed  
as prayed.*

(Decided December 18th, 1894.)

JOSEPH JONES vs. MATTHIAS GEORGE, USE OF  
ANDREW J. THAWLEY.

*Motion to Quash Execution—Scire Facias on Judgment—Limitations—  
Payment.*

The remedy for any errors or irregularities in a *scire facias*, reviving a judgment, is the same as in the case of the original judgment.

The right to issue a *scire facias* on a judgment may be barred by limitations, but the statute must be specially pleaded.

Seventeen years after a judgment was rendered in the Circuit Court of Queen Anne's county, and after the defendant had removed from that county, a *scire facias* was issued reviving the judgment, and a *fiert facias* issued to the county of the defendant's residence. Defendant had no notice of the *scire facias* until after the execution was issued and then moved to quash the writ for several reasons, one of which was that the original judgment had been paid. *Held*,

1st. That the defendant was entitled to have an opportunity to plead the Statute of Limitations to the original judgment.

2nd. That the execution should not be quashed on the motion, but a suspension of proceedings under it for a reasonable time should be ordered, so as to allow the defendant to move in the Circuit Court for Queen Anne's county to strike out the judgment of *fiat*, and for leave to plead to the *scire facias*.

Appeal from the Circuit Court for Caroline County.

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## Opinion of the Court.

The case is stated in the opinion of the Court by Mr. Justice  
 The cause was argued before ROBINSON, C. J., BRYAN,  
 McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.,  
 George M. Russum (with whom was Henry R. Lewis, on  
 the brief), cited *Heaf v. Shulze*, 10 Ohio, 263; *Frank v.*  
*Levell*, 5 Robt. (N. Y.) 600; *Norris v. Graves*, 4 Strobo  
 (S. C.) 32; *Bish v. Williar*, 59 Md. 388; *Bell v. Jones*, 32  
 Md. 332; *Burford v. McCue*, 53 Pa. St. 427; *Armstrong*,  
*v. Durland*, 11 Kansas, 15; *Hanley v. Donoghue*, 59 Md.  
 243; *Harryman v. Roberts*, 52 Md. 75; *Starr v. Heckart*,  
 32 Md. 270; *Job v. Walker*, 3 Md. 129.

John B. Brown and Edwin H. Brown, for the appellee,  
 cited 2 *Poe's Pldg. and Prac.*, secs. 11, 14, 450; *Campbell v.*  
*Booth*, 8 Md. 107; *Hall v. Clagett*, 63 Md. 60; *Union Bank*  
*v. Shriver*, 68 Md. 435; *Weaver v. Boggs*, 38 Md. 264;  
*Bowie v. Neal*, 41 Md. 134.

BRYAN, J., delivered the opinion of the Court.

A judgment was rendered for one hundred and forty-nine dollars and eighty-nine cents and cost, in favor of Matthias George against Joseph Jones and Thomas E. Meeds, in the Circuit Court for Queen Anne's County, on the third day of May, eighteen hundred and sixty-nine. George was styled "M." George in the writ, and *Matthias George* in the declaration. On the twenty-sixth of November, eighteen hundred and sixty-nine, a *feri facias* was issued on the judgment which was levied on certain personal property of the defendant, Meeds; and on the twenty-third of May, eighteen hundred and seventy, the sheriff made return of the writ as follows: "Goods and chattels taken as per schedule, and on hand by order of plaintiff." So far as the record shows, no further steps have been taken under the *feri facias*. On the second day of April, eighteen hundred and seventy-four, the plaintiff executed and filed in Court

a paper which purported to be an assignment of the judgment to Andrew J. Thawley. On the twentieth of January, eighteen hundred and eighty-seven, a writ of *scire facias* was issued to revive the judgment, and after two returns of *nihil*, judgment of *fiat executio* was in due course rendered on the fifth of May, eighteen hundred and eighty-seven. A writ of *feri facias* was issued to the Sheriff of Caroline County. A motion to quash the writ was made by the defendant, Jones, and being overruled by the Court, this appeal was taken.

It is maintained by the appellant, that the original judgment was void, because it was rendered in favor of "M." George, and therefore did not identify the plaintiff with precision; also, that the *scire facias* judgment was void, on account of the invalidity of the original judgment; also, because of the unexecuted *feri facias* already mentioned; also, because the original judgment had been paid; also, because the assignment was not for the whole judgment as an entirety; also, because there was not an inquiry of damages to ascertain the amount due on the original judgment; and also because the *scire facias* was issued after the lapse of more than seventeen years from the time the original judgment was due and payable. It was also alleged, that the *scire facias* judgment is void, because there was no notice to the defendants, and that they were prevented from having notice by the fact that John B. Brown, Esq., one of their attorneys in the original case, was one of the attorneys in the *scire facias* for the plaintiff. It is but just to say that the counsel for the appellant makes no imputation against Mr. Brown, and concedes that his action was entirely free from any improper motive or purpose. Mr. Brown testifies that when the *scire facias* was ordered, that he had no idea or recollection that he had ever had any connection with the case at any time; that there was no trial of the case, and that the probabilities are that he and the other attorney for the defendants (who is now deceased) were assigned under the rules which then prevailed. The record shows

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that there was no contest in the case, and that judgment by default was rendered for failure to plead. Mr. Brown also contends that whatever connection he had with defendants was terminated when the final judgment was rendered in the original case. The evidence clearly shows that both of the defendants were perfectly well aware of its rendition.

The Circuit Court for Queen Anne's County is a Court of general jurisdiction. It had jurisdiction of the cause, and of the parties when the original judgment was rendered, and therefore it cannot be void. If there was error or irregularity in the proceedings, they might have been set aside on application to that Court, or by appeal to this Court, provided the proper steps had been taken in due time. The *scire facias* judgment was rendered in the regular course of the Court, and according to established practice. The remedies for any errors supposed to exist are the same as in the case of the original judgment. The objections to these judgments, made by the appellant, cannot be heard and decided on the motion to quash the *feri facias*. This is the settled law. We need refer only to a decision made on a motion to quash a writ of *venditioni exponas*, issued under a judgment on a *scire facias* which revived the original judgment. In *Hall v. Clagett*, 63 Maryland, 59, it was said: "A motion to quash an execution does not open an inquiry into supposed errors or irregularities involved in the rendition of the judgment; if there be such errors or irregularities they must be corrected by the proper proceeding for so doing taken in the particular case." In *Campbell v. Booth*, 8 Maryland, 113, a motion was made to quash a *scire facias*, because there was an outstanding *feri facias* in full force when the writ of *scire facias* was issued; and secondly, because the judgment had been paid and satisfied. The Court held that these objections could be presented only by pleas, and that therefore the motion to quash ought to be overruled. The case came before the Court a second time in 15 Maryland, 569, and these defences being pleaded, it was decided that the pleas

were bars to the *scire facias*. These objections were identical with two of those which are made in this case. Since the decision in 15 Maryland it has been enacted by the Legislature that a plaintiff may have more than one execution outstanding at the same time. The *scire facias* might have been defeated by the plea of the Statute of Limitations. It has always been held in this State that this defence must be specially pleaded. The application of this rule of practice to writs of *scire facias* was recognized in *Mullikin v. Duvall*, 7 Gill & Johnson, 355; a case which has been frequently cited and approved, and never questioned. We conclude that the appellant cannot, by a motion to quash, obtain the relief which he seeks. But he is not without remedy. In *Starr v. Heckart & Young*, 32 Md. 267, a judgment had been rendered against the appellant, who afterwards received his final discharge under the insolvent laws. After his discharge a writ of *scire facias* was issued on the judgment, and after two returns of *nihil*, a *fiat* was entered, and execution issued. It was shown that the appellant had never assumed to pay the judgment since his final discharge, and that he had no notice of the *scire facias* and the subsequent proceedings until his property was seized under the execution. The Court held that he was entitled to an injunction restraining the execution of the judgment. It was satisfied that he had a good and valid defence, and though without fault or laches, that he had had no opportunity to make it, and that he did not have a full and adequate remedy at law. It had been argued that the two returns of *nihil* operated as constructive notice to the judgment debtor, and that he was as much concluded by the *fiat* judgment as if he had been summoned, and had waived his plea of discharge. But the Court refused to adopt this suggestion, and said, "If he has been summoned and a *fiat* is entered, he may be concluded; but if he has not been summoned and no opportunity afforded him to plead his discharge, it would be manifestly unjust to deprive him of a defence which he was not allowed to make. In 2 *Tidd's*

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*Practice*, 1185, it is expressly laid down, that when a party has a release or other matter which he might have pleaded to the *scire facias* in his discharge, and for want of pleading it, execution is awarded upon a *scire faci* returned, he is estopped forever, and cannot, by any means, take advantage of that matter. But when execution is awarded on two *nilis* returned, he may relieve himself by *audita querela*." The *audita querela* has been superseded in modern practice by motion to the Court. The Court said that this would not, as a general rule, afford a *full and adequate* remedy. Yet, if the party chooses to adopt it in preference to a bill in equity for an injunction, we can conceive of no reason why he should not be at liberty to do so. In the present case both of the defendants had removed from Queen Anne's County more than seventeen years before the issue of the *scire facias*, and we are satisfied that neither of them knew anything of it until after the execution was issued. The evidence is conflicting about the payment and satisfaction of the judgment, but there is no doubt that the original judgment is subject to the bar of the Statute of Limitations. Justice requires that the defendants should have an opportunity to plead these two defences. The Court below was right in refusing to quash the execution, but it ought to have ordered a suspension of proceedings under it for a reasonable time, so as to allow the defendants an opportunity to move the Circuit Court for Queen Anne's County to strike out the judgments of *fiat*, and to give them leave to plead to the *scire facias*. As we have heard the evidence in the case, there is no necessity that it should be heard again; we are therefore of opinion that when this motion is made, the Court ought to strike out the judgments of *fiat*, and give the defendant leave to plead.

*Order reversed and cause remanded  
for proceedings in accordance with  
this opinion.*

(Decided December 18th, 1894.)



## MICHAEL S. LEVY vs. IROQUOIS BUILDING COMPANY.

*Specific Performance—Marketable Title—Bona Fide Purchaser.*

Upon a bill for specific performance, where the defence is that the title to the property is not marketable, the Court does not decide whether the title is absolutely good or absolutely bad, but whether it is reasonably clear and free from doubt.

It is not every doubt, or even threat of contest, that will be sufficient to defeat a demand for the specific performance of a contract to buy land, but the doubt must be a reasonable one.

A. made a voluntary conveyance of certain property to his daughter B. in 1879, and four days later he made a will. On a *caveat* filed to this will in 1892, the same was set aside as having been obtained by fraud and undue influence exercised by B. After the filing of the *caveat*, the property so conveyed to B. was conveyed by her to the plaintiff, who agreed to sell the same to the defendant. The heirs at law of A. refused to relinquish their rights in the property, if any, but did not threaten to assail the validity of the deed from A. to B. *Held*,

That since the plaintiff was a *bona fide* purchaser for value without notice, his title was free from reasonable doubt, and that specific performance should be decreed.

Appeal from a *pro forma* decree of Circuit Court No. 2, of Baltimore City.

The case is stated in the opinion of the Court.

The cause was agreed before ROBINSON, C. J., McSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*Bernard Wiesenfeld*, for the appellant, cited: *Gill v. Wells*, 59 Md. 492; *Todd v. Union Dime Sav. Instn.*, 28 N. E. Rep. 504; *Fry on Specific Perform.*, sec. 869; *Brucker v. State*, 19 Wis. 539; *Devlin on Deeds*, sec. 84; *Story's Eq. Jur.*, secs. 700, 826; *Yanger v. Skinner*, 1 Mc-

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Argument of Counsel.

Carter's Ch. Rep. 389; *Lick v. Ray*, 43 Cal. 83; *Fonda v. Sage*, 48 N. Y. 173.

*Wm. S. Bryan, Jr.* (with whom were *James W. McElroy* and *Frank Gosnell* on the brief), for the appellee.

The appellee is a *bona fide* purchaser for value of the property in question, had no notice, actual or constructive, of the caveat proceedings, and if it had had such notice, such proceedings would not have disclosed anything concerning this property, as it was not involved in that controversy; nor has the existence of any fraud or undue influence in the execution of the deed to Mrs. Hiss attempted to be shown, much less brought home to the knowledge of the appellee.

The doubt which is sufficient to justify the rejection of a title must be considerable and rational, such as ought to induce a prudent man to hesitate. *Gill v. Wells*, 59 Md. 495; *Herzberg v. Warfield*, 76 Md. 449; *Green v. Pulsford*, 2 Beavan, 70; *Seldner v. McCreery*, 75 Md. 296.

Now, in view of the authorities, it cannot be successfully contended that Mrs. Weik has said or done anything that should prevent the appellant from completing his purchase, nor can it be contended that she has any intention of taking legal proceedings to attack the deed to Mrs. Hiss. If she had, she would naturally have communicated the same to her husband, and he (Weik) would have preserved the letter of May 10, 1894, addressed to them by Mr. Weisenfeld. Mrs. Weik not only would have notified appellant not to carry out his purchase, but would have taken steps to prevent the appellee from redeeming the ground rent reserved by the lease of January 16, 1892, the capitalization of the rent being \$10,000, or two-thirds of the whole purchase money of the property; but to this day she has not commenced any action or intimated to the appellee that it has not a good and perfect title. The utmost that can be extracted from her by the appellant is "*that she will assert her legal rights whenever it suits her convenience.*" Assum-

ing that Mrs. Weik had made such statement to the appellee, and had made it prior to the time of the lease or after the execution of the lease, and prior to the payment of the \$10,000 on the 1st day of February, 1894, for the redemption of the rent reserved by that lease, the appellee would not have been justified in refusing to complete its purchase with Mrs. Hiss. For neither at the time of the lease, nor at the time of the redemption of the rent, was there the slightest suspicion that Mrs. Weik, or anyone else, would even pretend to set up any claim to the property. There never has been any *lis pendens*, as the caveat did not relate to the property in question. *Fiegley v. Fiegley*, 7 Md. 563. And were it a fact, that Mrs. Weik had actually taken proceedings attacking the deed, this Court would not hesitate to affirm this decree. *Owings v. Baldwin*, 8 Gill, 337.

Mr. and Mrs. Weik were witnesses for the appellant in this cause—proceedings instituted for the purpose of compelling appellant to perform his contract of purchase—and on the stand they have positively refused to state whether or not they intend to attack the title. Now, in all common honesty and fair dealing, they are estopped from ever hereafter setting up any claim to the property in question. “If a person maintain silence, when in conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent.” *Funk v. Newcomer*, 10 Md. 317.

ROBINSON, C. J., delivered the opinion of the Court.

The plaintiff company, being the owner in fee of a lot of ground on McCullough street, sold a portion thereof, fronting 50 feet on said street, to the defendant, for \$6,666.67. The defendant paid \$25 in cash, and was to pay the balance so soon as the title could be examined. This is a bill by the plaintiff to enforce the specific performance of the contract of sale. The defendant refuses to take the title tendered

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by the plaintiff, on the ground that the title is not a *marketable title*.

The lot originally belonged to the late Bishop Ames, and he, on 3rd April, 1879, conveyed it to his daughter, Annie M. Hiss, the consideration set forth in the deed being the sum of five dollars and natural love and affection. On the 16th January, 1892, Mrs. Hiss and her husband leased the lot to the plaintiff for 99 years, and the deed was recorded on the same day. The lease was in consideration of \$5,000 in hand paid by the lessee, now plaintiff, and in further consideration of the payment of an annual rent of \$600; and this rent, by a covenant in the lease, was redeemable at any time after 16th January, 1894, upon the payment of \$10,000 and all accrued and accruing rent to the date of redemption.

On the 1st February, 1894, Mrs. Hiss and her husband conveyed the lot in fee to the plaintiff. The consideration set forth in the deed being \$10,000 and all accrued rent, the plaintiff having exercised its right to redeem the rent of \$600 per annum reserved in the lease. The effect of this deed was to merge the leasehold interest then held by the plaintiff, thereby making it the owner in fee. By the title papers on record, the plaintiff had therefore a clear fee simple title to the property. It appears, however, that Bishop Ames made his last will and testament on the 7th of April, 1879, four days after the execution of the deed to Mrs. Hiss, and on a *caveat* being filed to the will by Mrs. Weik, a granddaughter of the Bishop, on the ground that it was procured by the fraud and undue influence practised and exercised over him by Mrs. Hiss, the will was set aside. The *caveat* was filed in 1892, before the lot was leased by Mrs. Hiss to the plaintiff, and the judgment of the lower Court setting aside the will was affirmed by this Court in 1894, before the execution of the deed by her conveying the reversion. Being apprehensive under these circumstances that proceedings might be instituted by Mrs. Weik to set aside the deed of Bishop Ames to Mrs. Hiss, the defendant submitted to her and her husband a deed relinquish-

ing all right and title to the lot in question, and which they refused to execute. And on being pressed by the inquiry, they declined to say whether or not they intended to assail the deed to Mrs. Hiss, the reply being that they *would exercise their legal rights whenever it suited their convenience.*

And the question is whether, in view of these facts, the plaintiff has a marketable title which a Court of Equity will enforce the defendant to accept? The question as to what constitutes a marketable title has been, of course, the subject of a good deal of consideration by the Courts, and the books are full of cases in which the matter has been considered. The rule at one time was to decide in every case whether the title was good or bad, and to compel the purchaser to take it as good or dismiss the bill on the ground that it was bad. But as the judgment in such case bound only the parties to the suit, and those claiming under them, and as the question might be again raised by other parties, and upon matters and evidence not before the Court in the prior suit, it was deemed to be the safer rule not to decide whether the title was absolutely good or absolutely bad, but whether it was so clear and free of doubt, that the Court would compel the purchaser to take it, or whether it was one which the Court would not go so far as to decide it to be bad, but at the same time was the subject of so much doubt that a purchaser ought not to be obliged to accept it. In other words, whatever may be the private opinion of the Court as to the validity of the title, yet if there be a reasonable doubt, either as to matter of law or matter of fact involved in it, the purchaser will not be enforced to take it. And if the objection is based upon matter of fact, some reasonable ground of evidence must be shown in support of the objection.

The purchaser has the right, we have said, to demand a title which shall enable him not only to hold his land, but to hold it in peace; and one so clear of doubt as will enable him to sell the property for its fair market value. At the

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same time it is not every doubt, or suggestion, or even threat of contest that will be sufficient ; otherwise an assailing purchaser might in every case raise or make such an objection. And to avoid this the rule is now well settled, that the doubt must be a reasonable doubt, and one sufficient to cause the Chancellor to hesitate, whether the purchaser should be obliged to complete the contract of sale. And the question in this case comes down to this: "Whether the facts to which we have referred are in themselves sufficient to raise a *reasonable doubt* as to the plaintiff's title?" And in answer to this question, it is sufficient to say that at the time, the plaintiff bought the leasehold interest and the reversion, its vendor, Mrs. Hiss, had, so far as the records show, a clear, fee simple title to the lot in question ; and further, that there had been no threat, or even intimation, at that time, that Mrs. Weik or any other person intended to assail the deed to her ; and further, no such proceeding has been instituted. There was, it is true, a judgment setting aside the will of Bishop Ames, but the title of Mrs. Hiss, under the deed, was in no manner involved in that suit, nor would the judgment be evidence in a proceeding involving her title under the deed.

The appellant must therefore be considered as a *bona fide purchaser for a valuable consideration* from a vendor holding a fee simple title under a deed from Bishop Ames, without notice, actual or constructive, of an intention or purpose of any one claiming through him to assail it. And being a *bona fide* purchaser without notice, no proceeding by Mrs. Weik could in any manner affect its title. The objection, therefore, made to plaintiff's title, is not sufficient to create a reasonable doubt as to its validity. And unless there be such a doubt the defendant must accept the title tendered to him.

*Decree affirmed.*

(Decided December 19th, 1894.)

## ANNIE STEIN, WIDOW, ET AL. vs. ANNIE STEIN ET AL.

*Dower—Sale of Land Discharged Therefrom—Allowance in Lieu of Dower—Equity Practice.*

The same person should not appear as both a plaintiff and a defendant in the same cause, whether the proceeding be amicable or hostile.

Where a widow consents to a sale of her deceased husband's real estate discharged of her dower right, she is entitled under Code, Art. 16, sec. 43, to a fixed proportion of the net proceeds of such sale, and a Court of Equity has no power to change that proportion.

Where in such case the widow does not consent to the sale, she may have her dower laid off under the statute, but if this is not done, the sale must be made subject to her right of dower.

The widow cannot consent to the sale and at the same time claim a larger proportion of the proceeds of sale than is allowed by the statute in the case of her assent.

A widow was entitled to dower in certain property, directed by the will of her husband to be divided into four equal parts, which were then given in trust for the testator's children. A sale of the property was necessary in order to carry out the provisions of the will.  
*Held,*

- 1st. That the trustees appointed to make sale of the property for the purpose of division, had no power to sell the same free from the widow's dower, without her consent, upon awarding her for life one-third of the income to be derived from the invested proceeds of sale.
- 2nd. That if the widow should consent to the sale, she would not be entitled for life to one-third of the income to be derived from such proceeds.

Appeal from a *pro forma* decree of Circuit Court No. 2, of Baltimore City, by which it was adjudged that upon the sale of the property described in the case stated, with or without the consent of Annie Stein, widow, she should be entitled to one-third of the income derived from the proceeds of sale in lieu of dower in said property. The case is stated in the opinion of the Court.

Md.]

Opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*Bernard Wiesenfeld*, for the appellants, cited: *Williams case*, 3 Bland, 276.

*Bernard Wiesenfeld*, for the appellees, cited: *Maccubbin v. Cromwell*, 2 H. & G. 456; *Herbert v. Wren*, 7 Cranch, 370; *Hale v. James*, 6 Johns, 258; *Chase's case*, 1 Bland, 206-232; 2 *Scribner on Dower*, ch. 7, sec. 44; Ch. 23, sec. 9.

McSHERRY, J., delivered the opinion of the Court.

This is an appeal from a *pro forma* decree passed in a special case stated under rule forty-seven of the General Equity Rules. The facts are these: Annie Stein has a dower interest in certain property, which property was directed by the will of her deceased husband to be divided into four equal parts that were then given in trust for the testator's children. This property cannot be divided, and the widow's dower cannot be laid off. To carry out the provisions of the will, a sale and a division of the proceeds is necessary. The questions which the Court is asked to determine are: Can the trustees, appointed by a decree of a Court of Equity to make sale of this property for the purposes of a division, sell the same free from the widow's dower, without her consent, upon awarding to her for her life one-third of the income derived from the invested proceeds of such a sale? Or, if the widow should consent to the sale, will she become entitled during her life to one-third of the income derived from the invested proceeds of such sale? A *pro forma* decree was passed adjudging that upon a sale of the property, with or without the consent of the widow, she would become entitled to one-third of the income derived from the proceeds of sale, in lieu of dower. From that decree this appeal was taken.

It is perfectly obvious that this *pro forma* decree is wrong.



Before, however, proceeding to state the reasons in support of this conclusion, we must advert to the fact that the questions we are called on to decide, have been propounded in a cause in which the same person appears upon both sides of the controversy. Whether the controversy be amicable or hostile, such a procedure is anomalous. A person cannot be both plaintiff and defendant at the same time in the same cause. Diverse and conflicting interests cannot be represented on opposite sides of the docket by the same individual at one and the same time. This Court had occasion to express its strong disapproval of such a course in *Owens & Crow v. Crow & Hubbard*, 62 Md. 497. It was there said, and we now repeat: "We feel obliged to express our disapproval of a practice which has to some extent prevailed, namely, that of putting the same individual on opposite sides of the record. \* \* \* \* \* It is a solecism in jurisprudence for a party to sue himself. The same will would control both the prosecution and the defense, and there would be no real contestation. There is no propriety in such a practice, and no necessity for it. \* \* \* \* \* We cannot tolerate such a practice."

Coming now to the questions propounded, it is clear that there are but two conditions under which, in proceedings like this, the inquiry as to what disposition is to be made of the widow's dower can arise. And these are, first, where she consents to a sale of her deceased husband's real estate, clear and discharged of her dower right; and secondly, where she does not so consent. In both instances the law is explicit. As to the first, it is prescribed by sec. 43 of Art. 16 of the Code, that "in all cases where lands and tenements are to be sold under a decree, and the widow, who is entitled to dower in such lands, will consent in writing to the sale of the entire estate therein, the Court shall order the same to be sold free from any claim of dower, and shall allow the widow a portion of the net proceeds of such sale, not exceeding one-seventh and not less than one-tenth." This section comprehends all cases where the widow con-

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sents to a sale free of her right of dower. In every such instance, therefore, the Legislature has fixed within defined limits the amount to which she shall be entitled in lieu of dower, and no judicial tribunal has any power or authority to vary or change those limits. Hence, when the widow consents to a sale being made, free of her dower right, she must take in lieu of that dower precisely what the statute prescribes, and she is entitled to nothing more, nor can she be required to accept anything less. On the other hand, if she does not consent to such a sale, then she may have her dower laid off, under sec. 45 of Art. 16, or under sec. 62 of Art. 46 of the Code. But if this be not done, and a sale be made without her concurrence, it must be made subject to her right of dower. The fact that such a sale would yield smaller proceeds than an unincumbered title would produce, can have no influence on the question. The widow has the option to unite in the sale or not. If she declines to do so, her status is fixed by the law and she cannot be coerced; if she agrees to do so, then the amount to which she is entitled in lieu of her dower is settled and fixed by the Code. She cannot, therefore, consent to a sale and at the same time claim a larger proportion of the proceeds than the statute allows her where she does consent.

The case of *Maccubbin v. Cromwell*, 2 H. & G. 443, was much relied on by the appellees, but it has no application to the question before us. When that case was decided in 1828, the statutes in force in Maryland, with respect to sales free from the widow's dower, were much less comprehensive than they now are. At that time the Act of 1816, ch. 154, relating to decrees for the sale of the real estate of minors, the Acts of 1818, ch. 193, and 1819, ch. 183, respecting the sale of real estate to save the personalty, and the Act of 1820, ch. 191, reducing to a system the laws to direct descents, were the only statutes relating to the subject. The case of *Maccubbin v. Cromwell* was not within the purview of either of these Acts, for the decree was

passed upon a bill filed to set aside a conveyance alleged to be fraudulent as against creditors. But now, however, under sec. 43 of Art. 16, and sec. 63 of Art. 46, every case involving a sale of the widow's dower by her consent is fully covered.

It follows from what we have said, first, that the trustees appointed to make sale of the property referred to in the case stated have no power to make the sale clear of the widow's dower without her consent in writing; and secondly, that if they sell clear of her dower with her consent, they can award her, in lieu of her dower, no greater sum than the statute prescribes. This being so, the decree which undertook to give her one-third of the income derived from the proceeds of a sale made with or without her consent was erroneous and must be reversed with costs.

*Decree reversed with costs above and below and cause remanded.*

(Decided December 19th, 1894.)

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### MANLY DRENNEN vs. JOHN BANKS.

*Constitution, Art. 3, Sec. 29—Title of Statutes—Statutory Construction.*

The title of the Act of 1894, ch. 25, was an Act to repeal certain sections of the Local Code, "title, 'Cecil County,' sub-title, 'County Treasurer,' and to re-enact the same with amendments, providing for the election of a Treasurer of said county, in the year 1895, and his appointment in the meantime." The sections repealed authorized the County Commissioners to appoint a County Treasurer, who was in turn empowered to appoint deputies. The sections as re-enacted, provided that the treasurer should be elected at the general election of 1895, and that in the meantime the office should be filled by a certain named person, who should also be the Secretary of the County Commissioners, and the office of clerk of the commissioners was abolished. *Held,*

Md.]

Argument of Counsel.

That the Act was not in violation of Art. 3, sec. 29 of the Constitution, which provides that every law enacted by the General Assembly shall embrace but one subject, and that shall be described in the title.

Where the several provisions of a law are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject.

The grammatical construction of a statute is not always in judgment of law to be followed, particularly when by following it, and solely by reason of following it, a deliberate enactment of the Legislature would be annulled.

Appeal from the Circuit Court for Cecil County.

The case is stated in the opinion of the Court. As to the issue of the writ of *mandamus* referred to in the opinion, see the next case of *County Commissioners of Cecil County v. Banks*.

The cause was argued before BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

*John K. Cowen* and *Albert Constable* (with whom was *Wm. S. Evans* on the brief), for the appellant.

There is nothing in the title of the Act of 1894, ch. 25, which would lead the most cautious person to suspect that the objects sought to be accomplished were many radical changes in the law concerning the office of Treasurer of Cecil County, and which in effect amount to a recasting of the whole scheme of the original statute creating the office. Litigation involving this question has generally come before the Courts in cases where the contention has been that the title of the statute was too general, and that though the title might embrace the legislative purpose, it did not express it. The reverse is the case here. The title of this Act is not general, but specific; not broad, but narrow.

In this title there is no broad and comprehensive statement of an object that might properly be held to include a multitude of indefinite but germane details to be worked out in the provisions of the Act. On the contrary, it is as

severely restrictive as language can make it. By its narrow terms it has *affirmatively and positively excluded every object but the single one expressed*. Certain enumerated sections were to be first repealed and then re-enacted. The words are, "and to re-enact *the same* with amendments." Pausing there, it is of course clear, that had nothing more been said, the only objection which could have been taken to the title would be the one unsuccessfully urged in *Meekin's case*, 50 Md. 28, namely, that the title was too broad and indefinite to describe the legislation found in the body of the Act; that though it might embrace the legislative purpose, it would not express or describe it. But the sentence does not end with the word "amendments," but continues thus—"providing for the election of a treasurer of said county, in the year eighteen hundred and ninety-five, and his appointment in the meantime," thus clearly defining what those "amendments" were to be. So that we have by this title a complete description of what the proposed amendments were to consist, and also of the form which the repealed sections were to bear when re-enacted. They will, the title tells us, continue "the same" as before the repeal, with *such changes only* as are necessarily caused by the striking out of the existing provision for an appointment of a treasurer by the commissioners, and the introduction of a new provision for an election of that officer by the people.

The word "providing" in the title qualifies the preceding word "amendments," and upon the principle of *expressio unius est exclusio alterius*, the specifications following the word "providing" gave notice that the Act related only to the election and appointment of the treasurer. Therefore, all other changes and affirmative legislation were excluded. The word "providing" is not redundant, but restrictive. Affirmative words describing a particular subject are equivalent to negative words excluding other subjects.

Among the cases where this doctrine has been discussed and applied by the Courts, we would refer to the following: *Steifel v. Maryland Institution for the Blind*, 61 Md. 144;

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Argument of Counsel.

*Rader v. Township of Union*, 39 N. J. (Law) 509; *Matter of Application of Paul*, 94 N. Y. 497; *Callaghan v. Chipman*, 59 Michigan, 614; *State v. Powers*, 14 Indiana; *The People v. O'Brien*, 38 N. Y. 193; *Dobbins v. Northampton*, 50 N. J. (Law) 496; *The People v. Commissioners of Highways*, 53 Barb. 70; *Dorsey's Appeal*, 72 Pa. St. 192; *Montclair v. Ramsdell*, 107 U. S. 147; *Cooley on Constitutional Limitations*, 144-149, (1st edition.)

*John Prentiss Poe*, Attorney-General, and *C. C. Crothers*, (with whom was *Clinton McCullough* on the brief), for the appellee.

The words "providing for the election of a County Treasurer of Cecil County, in the year 1895, and his appointment in the meantime," do not operate to restrict the scope of the word *amendments*, but are only descriptive of some, but not by any means all of the amendments made in the Act. And, accordingly, the title is to be read as if instead of the comma, after the word "*amendments*," or without the comma, the conjunction "*and*" were there inserted; and thus the superadded words after the word "*amendments*" will be treated as put there to declare plainly the full purpose of the Act, as an Act which repealed and re-enacted the existing three sections "*with amendments*," *including* an amendment whereby the County Treasurer was to be elected by the people in 1895, and appointed in the meantime, but *not excluding* any other admendments. The title does not say how such intermediate appointment is to be made, but no objection to its sufficiency is made upon this ground, and this consideration demonstrates the want of real substance in the contention of the appellants.

But if it be assumed that the superadded words after the word "*amendments*" indicated that the "*amendments*" related to the *election* of a treasurer in 1895, and an *appointment* in the meantime, the result will be the same. An enumeration of the powers, responsibilities and compensation of the treasurer, when elected, and of the intermediate

appointee, would still be strictly pertinent and germane, if not necessary, and there is nothing in the superadded words which, by any fair construction, can be interpreted as equivalent to the declaration that *no other amendment or alteration* was contemplated by the absolute and entire repeal of the three sections in question, beyond a provision for an *election* in 1895 and an *appointment* in the meantime. Indeed, any such interpretation would be liable to the fatal objection that it limits without reason the full meaning of the plural word "amendments."

The constitutional provision in question, relating to the titles of statutes, was first introduced in the Constitution of New Jersey in 1844. It is not a new one in Maryland, having been contained in the Constitution of 1851. A reference to the adjudicated cases in which it has been considered by this Court will show that the Court below committed no error in declaring the Act in question to be entirely valid. *Davis v. State*, 7 Md. 160-1; *Keller v. State*, 11 Md. 531; *Parkinson v. State*, 14 Md. 184; *Mayor, &c., of Annapolis, v. State*, 30 Md. 119; *Co. Comrs. v. Frankliu R. R. Co.*, 34 Md. 163; *Cearfoss v. State*, 42 Md. 405; *McGrath v. State*, 46 Md. 633-4; *Co. Comrs. of Dorchester Co. v. Meekins*, 50 Md. 28; *2d German Am. Bldg. Asso. v. Newman*, 50 Md. 657; *Co. Comrs. of Talbot Co. v. Co. Comrs. of Queen Anne's Co.*, 50 Md. 245; *Mayor, &c., of Baltimore v. Reits*, 50 Md. 579-580; *State v. Fox*, 51 Md. 414; *Co. Comrs. of Prince George's Co. v. Comm. of Laurel*, 51 Md. 460; *Mayor, &c., v. Stoll*, 52 Md. 438; *Md. Agr. College v. Keating*, 58 Md. 583-4; *Stiefel v. Md. Institution*, 61 Md. 148; *Slymer v. State*, 62 Md. 243; *State v. Norris*, 70 Md. 94-5; *Co. Comrs. of Calvert Co. v. Hellen*, 72 Md. 605-6; *Scharf v. Tasker*, 73 Md. 383; *Gans v. Carter*, 77 Md. 1.

In only two of these twenty-one cases, (*viz.*, in *Stiefel v. Md. Institution*, 61 Md. 148, and in *Scharf v. Tasker*, 73 Md. 383), was the constitutional objection to the statute under review sustained, whilst in quite a number of them it seemed more plausible than can be claimed here.

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McSHERRY, J., delivered the opinion of the Court.

By sec. 119 of Art. 8 of the Code of Public Local Laws, the County Commissioners of Cecil County were authorized to appoint annually a county treasurer, whose duties were defined by that and the two succeeding sections. His salary and fees were fixed, and he was empowered to appoint one or more deputies, whose compensation was directed to be paid out of his salary. By the Act of 1894, ch. 25, secs. 119, 122 and 123 of Article 8 of the Local Code were repealed and re-enacted with amendments. In the new section 119, it was provided, amongst other things, that the county treasurer should be elected by the voters of Cecil County at the general election to be held in 1895, and that in the meantime the duties of the office should be discharged by John Banks, who was appointed treasurer *ad interim* by the statute. The same new section further provided, that the treasurer should have power to appoint a deputy at a fixed salary to be paid by the county ; and that the treasurer himself should have his office in the room of the County Commissioners ; and also that he should be their secretary and should have possession of all their books and papers ; and it then abolished the office of clerk to the County Commissioners, which latter office existed under sec. 107 of Art 8 of the Local Code. It is insisted that this Act of 1894 is unconstitutional, and the reason assigned is, that its provisions are broader than its title warrants. Sec. 29 of Art. 3 of the State Constitution, with which the Act of 1894 is alleged to be in conflict, provides that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The title of the Act of 1894, ch. 25, is in these words: "An Act to repeal sections 119, 122 and 123 of Article eight of the Code of Public Local Laws, title, 'Cecil County,' sub-title, 'County Treasurer,' and to re-enact the same with amendments, providing for the election of a treasurer of said county in the year 1895, and his appointment in the meantime." The appellant, Drennen, who



claims to hold the office of Treasurer of Cecil County by appointment made by the County Commissioners under the above cited provisions of the Local Code, but by an appointment made after the Act of 1894 was adopted and had become effective, refused to surrender to the appellee Banks, who was appointed to the same office in the body of the Act of 1894, the books and papers belonging to the office of treasurer, alleging, as already stated, that the Act of Assembly, by which the appellee was so appointed treasurer, was invalid, because the General Assembly, in adopting it, failed to obey the provisions of sec. 29 of Art. 3 of the Constitution. After this refusal the appellee made application to the Circuit Court for a writ of *mandamus* to compel the surrender to him of the office and the books and papers pertaining thereto, and the writ was finally directed to be issued. From that order this appeal was taken.

Thus the sole question before us on this record is, whether the title of the Act of 1894, ch. 25, is sufficiently descriptive of the subject of the Act to sustain the enactment?

The clause of sec. 29 of Art. 3 of the Constitution, which was for the first time incorporated in the organic law of Maryland, in 1851, and which is now relied on to defeat the Act of 1894, has been repeatedly considered by this Court, beginning with the case of *Davis v. The State*, 7 Md. 151, decided in 1854, and coming down through a period of nearly forty years to the case of *Gans v. Carter and Aiken*, 77 Md. 1, decided in 1893. It has been uniformly held through the long line of cases contained in the intervening reports, that the meaning of this clause is, that "If the several sections of the law refer to and are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject and as satisfying the requirements of the Constitution in this respect. While the title must indicate the subject of the Act, it need not give an abstract of its contents, nor need it mention the means

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and method by which the general purpose is to be accomplished." *Mayor, &c. v. Reitz*, 50 Md. 574.

The title of the Act of 1894 consists of one sentence, comprising two members, the first of which extends to and includes the word "amendments," and the second comprehends all after the same word. It was conceded that the first member of this compound sentence, that is to say, "An Act to repeal sections 119, 122 and 123 of Article 8 of the Code of Public Local Laws, title, 'Cecil County,' sub-title, 'County Treasurer,' and to re-enact the same with amendments," is sufficiently descriptive of the subject of the Act to be free from any constitutional objections, if it stood alone, and therefore, that the whole body of the Act, with its various provisions, would have been within or embraced by that part of the title. It was also conceded, and it could not have been successfully disputed, that the second member of the whole compound sentence, that is to say, an Act "providing for the election of a treasurer of said county, in the year 1895, and his appointment in the meantime," is also, had this been original legislation on this subject, sufficiently descriptive of the subject of the Act to be free from any constitutional objection, if it stood alone; and therefore, that the whole body of the Act, with its various provisions, would have been within or embraced by that portion of the whole title. The numerous cases decided by this Court on this subject fully demonstrate the correctness of these two concessions; but we particularly refer to *The State v. Norris*, 70 Md. 91, and *Com. of Calvert Co. v. Hel-len*, 72 Md. 603. In 70 Md. the title of the Act assailed, was "an Act to add a new section to Article 30 of the Code of Public General Laws, title, 'Crimes and Punishments,' sub-title, 'Rivers,' to come in after section 171." This Court upheld the Act, though the subject of the Act was the prevention of dredging, taking and carrying away of sand and gravel from the bed of the Potomac River, and the prescribing of a punishment for a violation of the Act. In 72 Md. the title of the Act assailed was "an Act to create

a treasurer for Calvert County, and to provide for the collection of taxes therein." This Act was upheld, though it gave the treasurer, whom it authorized the Governor to select, power to appoint a deputy, who, under the Act, became clerk to the County Commissioners.

Notwithstanding, then, that each of these two component parts of the title would be, if standing alone, sufficiently descriptive of the subject of the statute to validly include the whole Act; and notwithstanding the concession that either one of them by itself would have been a good title within the 29th section of the 3d Article of the Constitution, to sustain the entire statute, had it been original legislation, and not merely an amendatory enactment; still, it is insisted that the use of both of them in a statute making amendments to an antecedent law, results in the one title qualifying the other, and thereby produces a restricted title not broad enough to comprise many of the provisions of the enactment. If this be so, then the use of these two comprehensive titles has made a less comprehensive title than would have been furnished by the use of either one of its constituent parts alone. But this cannot be, and it makes no difference whether the statute originates new legislation or is merely amendatory of prior enactments. The legal principles applicable are the same in both instances. Two universal propositions, and it is immaterial whether their universality be metaphysical, physical or moral, whose subjects are taken according to their entire extension, because the propositions are universal, can never be equivalent to a particular proposition. If one be the contrary of the other they may be mutually nullified; but they cannot, by being used together, result in a particular proposition. So likewise, the two general titles of the Act continue to be general though used together, and do not become more restrictive than either would singly be. As both of these divisions of the title are general, and as neither is the contradictory, much less the contrary of the other, the employment of the two obviously cannot invalidate a statute which

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either branch of the compound title standing alone would have been sufficient to support. If the whole Act could have been validly included under either branch or division of the title, as has been conceded and as is undoubtedly the case, then neither of these branches or divisions can be in conflict with the other; and if neither be in conflict with the other, then neither can qualify or limit the scope of the other. Had either branch of the whole title been insufficient by itself to carry the whole Act, the use of both—the one broad enough and the other not broad enough—might properly be construed into a qualification of the more general by the more restricted one. But where both are equally broad, no such result can be predicated of their combined use without denying to the one or to the other the effect which either would confessedly have had, had it been used alone. This is essentially so, because the second branch of the title simply provides for the doing of the very things which could have been done, and validly done, under the first branch, and is, therefore, no qualification of the scope of the latter, and hence, does not restrict the subject of the Act to a narrower limit than the first branch standing alone would have indicated.

It has, however, been objected, that if the same effect be given to the title as it stands, that would undoubtedly have been given to either member or division of it singly, then such effect can only be given by disregarding the rules of grammar, or by changing the participle "providing" into the infinitive mood "to provide," and by inserting the conjunction "and" after the word "amendments." Bad grammar will not vitiate a statute. Whilst the structure of the title would have been much more artificial had it been framed in the way suggested, still grammatical construction is not always in judgment of law to be followed, particularly when by following it, and solely by reason of following it, a deliberate enactment of the Legislature would be annulled. The validity of such enactments cannot be made to depend upon mere rules of grammar. The construc-

tion must be such as will rather uphold than strike down the statute. To justify the Courts in setting aside enactments of the co-ordinate legislative department of the State Government there must be a plain and not a doubtful violation of the organic law ; *Davis v. Helbig*, 27 Md. 452 ; or a palpable invasion of that fundamental principle of right and justice which rises above, restrains and sets bounds to the power of the Legislature independently of any express restriction in the Constitution itself. *The Regents, &c., v. Williams*, 9 G. & J. 408. Mere doubt as to their validity, springing from or having its origin in grammatical construction, will never alone suffice.

Laying aside mere questions of grammar, it is obvious that the title of the Act of 1894, ch. 25, is as broad as is either of its consistent, constituent parts. It is equally obvious that the Act itself embraces, as its single subject the several duties, functions, powers, tenure and compensation of the County Treasurer of Cecil County, as well as the method of his selection. According to all of our former decisions, and for the reasons we have assigned, that subject is sufficiently described in the title and the Act is accordingly valid.

As much reliance was placed on the case of *Steifel v. Md. In.*, 61 Md. 148, we may say that nothing decided in that case is at all in conflict with the conclusion we have reached in this. There the title of the Act of 1880 was to repeal a prior Act and nothing was said about re-enacting the old law with amendments, or enacting a new one in lieu of the old. Though the title was silent as to every thing but the fact of a repeal of the antecedent law, the Legislature undertook to enact affirmative legislation in the second section of the Act, whose title purported that the Act was designed only to repeal a former law. The portion of the Act which attempted this affirmative legislation was declared invalid because no reference whatever had been made to it in the title. The title was restrictive, because it professed to be the title of only a repealing Act ; but the body of the

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statute went farther, and in a separate section enacted affirmative legislation.

The only objection to the Act of 1894, ch. 25, being the one we have considered, and that one being untenable, the appellee was entitled to the writ of *mandamus*, and the Circuit Court for Cecil County was right in ordering that writ to be issued. Its order will therefore be affirmed with costs.

*Order affirmed with costs in this Court  
and in the Court below.*

(Decided December 19th, 1894.)

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THE COUNTY COMMISSIONERS OF CECIL COUNTY *vs.* JOHN BANKS.

*Mandamus—Office of County Treasurer—Official Records.*

A neglect to discharge a public duty, or circumstances which clearly evince an intention not to do the act required, will furnish a sufficient foundation for issuing the writ of *mandamus*.

An Act of Assembly appointed the petitioner Treasurer of Cecil County until the next general election, and directed that he should also serve as secretary of the County Commissioners, and have possession of all their books and papers, as well as those of the office of treasurer. The petitioner, after having qualified, demanded from the County Commissioners the possession of the books and papers belonging to the office of County Treasurer, with which demand they refused to comply, alleging that a third party then filled the office of treasurer, and that they had no power to eject him. *Held,*

That since such third party was not a trespasser, but was in possession of the books, etc., as the appointee of the commissioners, and was their servant, it was the duty of the commissioners to comply with said demand, and a writ of *mandamus* was properly issued to

enforce delivery to the petitioner of the books and papers of which the Act made him the custodian.

The petition in this case also alleged that after the passage of the above-mentioned Act, the County Commissioners admitted a certain person to the office of County Treasurer, and delivered to him the books and papers of the office, and that he refused to deliver them to the petitioner. *Held,*

That both this person and the commissioners were amenable to the writ.

Appeal from the Circuit Court for Cecil County. The case is stated in the opinion of the Court. The petition of the appellee, therein referred to, also alleged that after the passage of the Act of 1894, ch. 25, the County Commissioners of Cecil County admitted to the office of treasurer of said county, the defendant, Manly Drennen, and delivered to him the books and papers of said office, and that he had refused the petitioner's demand for the same.

The answer of Drennen admitted his refusal, and claimed to hold the office of treasurer under an appointment made by the County Commissioners on July 1, 1894. The Court below (ROBINSON, C. J., STUMP and WICKES, JJ.), directed the writ of *mandamus* to issue against Drennen in a separate proceeding against him. (See the case of *Drennen v. Banks*, *ante* p. 310.) In this case the Court sustained the petitioner's demurrer to the answer of the County Commissioners, and ordered the issue of a writ of *mandamus* commanding them to deliver to the petitioner, John Banks, as Treasurer of Cecil County, the books, records and papers belonging to said office, and also the books, etc., of the said County Commissioners; and further commanding them to permit the said Banks, as treasurer, to occupy the office of the County Commissioners. From this order the defendants appealed.

The cause was argued before BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

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*John K. Cowen* and *Albert Constable* (with whom was *Wm. S. Evans* on the brief), for the appellant, cited: *The King v. Round*, 4 A. & E. 139; *Barnardo v. Ford* (1892), A. C. 326.

*John Prentiss Poe*, Attorney-General, and *C. C. Crothers* (with whom was *Clinton McCullough* on the brief), for the appellee.

McSHERRY, J., delivered the opinion of the Court.

In the preceding case of *Drennen v. Banks*, we decided the Act of Assembly of 1894 ch. 25, which appointed the appellee, Banks, County Treasurer of Cecil County, to be constitutional and valid; and in the case we are now about to dispose of, not only is the constitutionality of the Act again involved, but the further question is presented as to whether a writ of *mandamus* ought to have been issued against the County Commissioners of Cecil County, requiring them to deliver possession of the books and records of their office, and the books and papers of the County Treasurer to the relator Banks.

The petition avers that Banks, who is the person appointed County Treasurer by the Act of 1894, ch. 25, made demand upon the County Commissioners to be admitted to the office of County Treasurer; that he further demanded they should deliver to him all the books and papers belonging to said office of treasurer, and also all records, books, &c., of the County Commissioners' office, all of which books, papers and records the petition charges were then in the possession and custody of the County Commissioners, and to the possession and custody of which the relator claimed to be entitled under the Act of 1894.

It avers further, a demand of the privilege to occupy the room or office of the County Commissioners for the purpose of enabling the relator to discharge the duties of treasurer. All these demands the petition states the County Commissioners refused to comply with. The answer of the Com-



missioners admits that the relator demanded to be admitted to the office of Treasurer of Cecil County ; that he demanded the respondents should deliver to him all the books and papers belonging to said office of treasurer, "and all records of which he was, by virtue of the said office, the custodian ; and that, for the purpose of the performance of his duties as treasurer, he be allowed to occupy the office of said respondents." The answer then proceeds : " But this respondent says that the office of Treasurer of Cecil County was, at the date of said demand, filled by a certain Benjamin M. Crawford, who claimed to be entitled to retain said office and the custody of all books and papers and records belonging to the office of Treasurer of Cecil County ; and your respondent had no legal power to eject the said Crawford and install the said petitioner in said office." It then denies that the respondent refused to allow the relator to occupy the office of the respondent. It continues : " This respondent further denies, that the petitioner ever demanded of it that the respondent deliver to him the records, books, &c., of the County Commissioners' office of Cecil County, or made any other demand in regard to books or papers, save as above admitted." The relator demurred to the answer. The Court sustained the demurrer and directed the writ to issue. From that order the pending appeal was taken.

The Act of 1894, ch. 25, amongst other things, expressly declares that the County Treasurer, for whose election in 1895 it makes provision, and that Banks, whom it in terms appoints County Treasurer until an election shall be held, shall have the custody of all the books and papers of the County Treasurer's office, and the records, books, &c., of the County Commissioners' office. This Act went into effect on February the twenty-first, 1894, and the term of the office to which it appointed Banks commenced on the first Monday of May following. From and after that day Banks, who duly qualified and gave bond as the Act directed, was, by the explicit terms of

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the Act, the legally appointed County Treasurer of Cecil County, and as such was undeniably entitled to the possession of the office and to the custody of the books, papers and records pertaining thereto, as well as to those belonging to the County Commissioners.

If the Act of 1894 was valid, as we have decided that it was, it became the plain duty of the County Commissioners to obey its provisions, and accordingly to turn over to Banks, when he qualified, all the books, papers and records of which, under the Act, he was made the custodian. They distinctly admit that he made a demand upon them for the delivery to him by them of "all the books and papers belonging to said office of Treasurer of Cecil County, and all records of which he was by virtue of the said office custodian." These included those belonging to the County Commissioners. But they aver, by way of excuse for their failure or omission to obey the law, first, that the Act of 1894 was invalid, and secondly, that a certain Crawford then filled the office of County Treasurer, and that they had no power to eject or displace him. The first objection, respecting the validity of the statute, we have disposed of in the preceding case of *Drennen v. Banks*.

The second is equally of no avail. If Crawford was in possession of the office when Banks, who had been legally appointed and had duly qualified, made demand for it, Crawford must have been there by appointment of the County Commissioners. It is not pretended that he was a bald trespasser or usurper, holding by force against both the County Commissioners and Banks, the statutory appointee. Whatever the nature of his tenure was, it was such only as the County Commissioners had created, or attempted to create; because, *before* the passage of the Act of 1894 they alone had the authority to make the appointment, and *after* its passage the office became elective, except as to the *ad interim* appointment of Banks. As Crawford was not a usurper; was never elected under the Act of 1894, and was not the appointee named therein, he must have been the mere ser-

vant of the Commissioners by their selection. Therefore, when they relied on Crawford's mere physical occupancy of the office as furnishing a reason why they did not comply with the relator's demand, they presented no valid justification for their refusal or neglect to obey the law, for the possession of their servant was their own possession.

It was their plain duty to turn over to Banks the books and records which they admit he demanded, and these were not only the books and papers belonging to the office of County Treasurer, but all records, books, &c., of which, by the Act of 1894, he had been made, in virtue of his office, the custodian. They did not do this, though they had these books, papers and records under their control, even if a portion of them were in the actual custody of their appointee, Crawford. By the law existing prior to the passage of the Act of 1894 they were the proper custodians of the records belonging to the County Commissioners' office. The Act of 1894 transferred the custody of these same records to Banks, and the refusal of the County Commissioners, whether actual or constructive, to deliver to him the books, papers and records of which he was made by the statute the legal custodian, justified the Circuit Court in ordering the writ to issue, notwithstanding the averment in the answer that Crawford was in possession of the books and papers belonging to the office of treasurer at the time that the demand was made, because Crawford's possession was, in the eye of the law, the possession of the respondents.

It will not do to say that the respondents denied that they had refused to deliver up the records belonging to the County Commissioners' office, and that the demurrer admitted the truth of the denial, because, though the concluding sentence of the third paragraph of the answer does deny that a demand was made for the records, books, &c., of the County Commissioners' office, the denial is accompanied by the qualifying words "save as above admitted." And the admission thus referred to, and which is set out in the first part of the same paragraph, is, that

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the demand made was for all books and papers belonging to the office of County Treasurer, "*and all records of which he was by virtue of said office the custodian.*" As Banks was by virtue of his appointment custodian of the records belonging to the County Commissioners' office, his demand of all the records of which he was by virtue of his office the custodian necessarily included a demand of the records so belonging to the County Commissioners' office. Thus, instead of the answer denying that a demand had been made, it in fact and legal effect, admits it. Besides this, it is not material in this case whether there was an explicit refusal on the part of the Commissioners to comply with the demand. They in fact did not comply. A neglect to discharge a public duty, or circumstances which clearly evince an intention not to do the act required, will furnish a sufficient foundation for issuing the writ. 2 *Dillon, Mun. Corp.* (2d ed.) sec. 696; *People &c. v. Kingston*, 101 N. Y. 82; *State, &c., v. Turpen*, 43 Ohio St. 311.

That the respondents did neglect to perform the public duty imposed by the statute is abundantly apparent; and the pretext relied on, that their own appointee was in actual possession of the books when the demand was made, cannot be permitted to defeat the claim of the relator.

The fact that a writ of *mandamus* was also ordered to be issued against Drennen in no way deprived the Circuit Court of authority to order the writ against the County Commissioners. Both they and Drennen were amenable to it and it rightly went out against them all.

We accordingly affirm the order appealed from.

*Order affirmed with costs above and below.*

(Decided December 19th, 1894.)

CENTRAL RAILWAY COMPANY vs. ELIZABETH  
COLEMAN.*Bills of Exception—Negligence—Legal Sufficiency of Evidence—  
Instructions to the Jury.*

A bill of exceptions to the ruling of the Court below, which is not signed by the trial Judge, will not be considered on appeal.

In an action against a street railway company, to recover damages for a personal injury alleged to have been caused by the defendant's negligence, the evidence for the plaintiff showed that she was an old woman, very deaf, and that in attempting to cross a street she was struck by defendant's trolley car; she testified that she heard no bell and did not see the car, and could not say how she was struck, although, before crossing the street, she had carefully looked. Other witnesses for the plaintiff testified that they were within a few feet of the place where the accident occurred; that the plaintiff was struck by the front part of the car, and that they did not hear a bell rung. The evidence on the part of the defendant was that the place of the accident afforded an unobstructed view of approaching cars; that the bell was rung at the crossing; that the plaintiff was not on the track or in front of the car, but that she walked into the side of the car when the same had stopped. *Held*, that since the evidence was contradictory, the question of negligence on the part of the defendant was properly left to the jury.

## Appeal from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court. At the trial the plaintiff offered the following prayers:

*Plaintiff's 1st Prayer.*—That if the jury find from the evidence that the plaintiff, while crossing Caroline street, on Monument street, was struck by a car of the defendant, and injured; and if the jury further find that the injury to the plaintiff was caused by the want of ordinary care and prudence of the servant of the defendant, and that the plaintiff used reasonable care and caution (as defined in plff's. 2d prayer) in crossing said street, then the plaintiff is entitled to recover in this action. (Granted.)

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*Plaintiff's 2nd Prayer.*—The degree of care required of the plaintiff was such as should reasonably be expected from an ordinarily prudent person in her situation, affected as she was by imperfect hearing and infirmities of age. (Granted.)

*Plaintiff's 4th Prayer.*—If the jury find for the plaintiff, then, in estimating the damages, they are at liberty to consider the health and condition of the plaintiff before the accident, with her present condition in consequence of her said injury, and whether said injuries are permanent and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of said injuries, she would have been qualified, and also the physical and mental suffering to which she has been subjected by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has suffered. (Granted.)

*Plaintiff's Fifth Prayer.*—Even if the jury find that there was want of ordinary care on the part of the plaintiff, yet she is entitled to recover, provided that the defendant could have avoided the accident by the use of ordinary care after it saw, or by the use of ordinary care might have seen that the plaintiff was approaching near to the track and was in danger of being struck by the car. (Granted.)

The defendant excepted specially to the granting of the plaintiff's prayers and each of them.

The defendant offered three prayers.

*Defendant's 1st Prayer.*—The defendant prays the Court to instruct the jury that there is no evidence in this cause legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. (Rejected.)

*Defendant's 2nd Prayer.*—The burden of proof is upon the plaintiff to show that the injury complained of was caused by the want of ordinary care on the part of the defendants or their servants, and unless the jury shall be satisfied by the preponderance of testimony that the injury

complained of was caused solely by the want of ordinary care on the part of defendants or their servants, the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendants. (Granted.)

*Defendant's 3rd Prayer.*—If the jury find from the evidence that the accident complained of was in any degree owing to a want of care and caution at the time of the accident on the part of the plaintiff directly contributing thereto, their verdict must be for the defendant; and in passing upon the question of the want of proper care on the part of the plaintiff, the jury are instructed that the deafness of the plaintiff, if they find she was deaf or hard of hearing, casts upon her the duty of being more careful in keeping a proper lookout for passing vehicles than if she were in the possession of her faculty of hearing. (Granted.)

The Court below (RITCHIE, J.), rejected the defendant's first prayer and granted its second and third prayers, in connection with the plaintiff's fifth prayer; to which action of the Court in granting the first, second, fourth and fifth prayers of the plaintiff, and each of them, and in rejecting the first prayer of the defendant, and in granting the second and third prayers of the defendant in connection with the plaintiff's fifth prayer, the defendant excepted.

The jury found a verdict for \$300 for the plaintiff and the defendant appealed.

The cause was argued before BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*George Blackistone* (with whom was *T. Wallis Blackistone* on the brief), for the appellant.

The plaintiff's first prayer in part correctly sets forth the general principles governing actions for negligence, but is misleading and does not apply to the specific circumstances of this case, and is also objectionable in its reference to the plaintiff's second prayer. The plaintiff's second prayer does not correctly state the law applicable to a person

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Argument of Counsel.

afflicted as was the plaintiff. These two prayers are erroneous for the following reasons: "The plaintiff's infirmity casts on her the duty of being more careful in keeping a proper lookout for passing vehicles than if she was in possession of her faculty of hearing." 4 *Am. & Eng. Ency. of Law*, sec. 35, p. 80; *Booth Ry. Law*, sec. 386; 8 Ohio St. 579; *Fenneman v. Holden*, 75 Md. 7; 2 *Shearman & Redfield on Negligence*, sec. 481. These prayers leave the jury without proper guidance. *Zimmerman v. H. & St. J. R. R.*, 71 Mo. 491.

The plaintiff's fifth prayer should not have been granted. There was no evidence that there was the slightest want of care on the part of the motorman, either in keeping the proper lookout or in doing his utmost to stop his car the moment he had the slightest reason to believe that the plaintiff was going to put herself in a position of danger. When she stepped from the curbstone to the pavement, he saw her and rang his gong, and did more than would ordinarily be done in the middle of a block upon seeing an adult merely step down from the curb—he shut off his power and applied his brakes. He was then thirty or forty feet from her. He did not know she was deaf—she was not blind—and he had a right to assume that she would not walk in front of the car or into its side. More than this, both he and the passenger, Delbo, who are uncontradicted, say that upon stepping from the curb, many feet above the crossing, plaintiff stopped and turned towards the point from which she came. The moment she turned again toward the car he called to her and pulled his reverse. Could any over-cautious motorman have done more, unless this Court is willing to reverse the rule stated in *Geis' case*, 31 Md. 364, and in 62 Md. 402, that it is to be presumed that people will keep themselves out of difficulty and danger, and hold, that in the operation of railways, the presumption is to be that an adult, even when in a place of safety and in apparently full possession of his faculties, is always to be credited with the intent to throw himself in front of a rapidly moving car, in broad daylight,



in full sight and hearing. It is submitted that to so hold will make the operation of railways an impossibility, except at such a rate of speed that the cars can be stopped instantaneously. It would be to establish a principle ruinous to the companies and dangerous to the public in its tendency to encourage recklessness on its part. Placing the distance at the greatest given in the testimony, and it could not have more than three or four seconds from the time the plaintiff stepped from the pavement before she walked into the side of the car.

This fifth prayer is clearly erroneous. Railroad employees, having given the usual signals, are not required to stop a train on discovering a person on the track; but are justified in supposing that he will get out of danger. *Frech v. P. W. & B. R. R. Co.*, 39 Md. 580; *Schroeder's case*, 69 Md. 558; *Booth Ry. Law*, 414; *Fenton v. Second Ave. Co.*, 126 N. Y. 627; *Schwartz v. Crescent City Ry. Co.*, 30 La. An. 19. In the case of children drivers are charged with notice of their incapacity, but have a right to suppose that adults will take care of themselves. 23 *Am. & Eng. Ency.*, p. 1026; *Schulte v. N. O. Ry. Co.*, 44 La. An. 511; *N. C. Ry. Co. v. Geis*, 31 Md. 366.

The defendant's three prayers should have been granted without modification or qualification. The defendant's first prayer asks the Court to instruct the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to recover. This Court needs no authorities upon the right and duty to grant this prayer upon a proper state of facts, and it is submitted that a stronger case of the propriety of granting it could hardly be presented than is disclosed by the record in this. A car can be seen approaching for nearly half a mile, on an open wide street, yet it is not seen and is not heard. The plaintiff does not cross at the regular flag crossing, but near the middle of the square. She was not a passenger. There is no presumption of negligence on the part of the defendant. Is there anywhere in the evidence anything to prove negligence on its

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part? The burden is on the plaintiff. *State, use of Miller, v. B. & O.*, 58 Md. 224; *State, &c., v. Malster*, 57 Md. 309.

The plaintiff's contributory negligence is clear. It was error to submit the case to the jury. *Am. & Eng. Ency.*, p. 1026, and notes 2 and 3, vol. 23; *R. R. Co. v. Houston*, 95 U. S. 702; *P. W. & B. R. R. v. Stebbing*, 62 Md. 514-15; *Kelly v. Hendric*, 26 Mich. 261; *Thomas v. Citizens Ry.*, 132 Pa. St. 504; *State, use of Dryenfurth, v. B. & O. R. R.*, 73 Md. 377-8; *Ehrisman v. Harrisburg Ry. Co.*, 150 Pa. St. 186; *Booth on Street Railways*, secs. 311-12; *Wharton on Negligence*, sec. 384; *Beach on Contrib. Neg.*, sec. 63; *Busby v. Phila. Traction Co.*, 126 Pa. St. 561.

*C. D. McFarland* (with whom were *Peter J. Campbell* and *S. P. Campbell* on the brief), for the appellee.

The prayers granted by the Court are strictly in accordance with the law, as stated in the recent case of *The Baltimore Traction Co. v. Wallace*, 77 Md. 435, and it is needless to cite further authorities. The first prayer of defendant, "that there is no evidence in this cause legally sufficient to entitle the plaintiff to recover," being general in its terms, it is understood to raise the single question, whether there was any evidence of negligence on the part of the defendant, and does not in any way raise the question of contributory negligence on the part of the plaintiff. Under the authority of *Hatton v. McClish*, 6 Md. 407; *Casey v. Suter*, 36 Md. 1; *Kinsey v. Minnick*, 43 Md. 112; *Gill v. Weller*, 52 Md. 8, and *Shipley v. Shilling*, 66 Md. 558, it would seem that defendant's first prayer is too general to raise any question for the consideration of this Court.

There was evidence of negligence on the part of the defendant. If there was any evidence from which an honest and fair-minded jury could find the fact sought to be proved, then the case should not be taken from the jury. *Cole v. Hebb*, 7 G. & J. 20; *Tiffany v. Savage*, 2 Gill 129; *Corner v. Pendleton*, 8 Md. 337.

Before the defendant would be entitled to have granted its first prayer, it must admit the truth of the testimony offered on part of the plaintiff, and of the testimony offered by defendant, which may operate in her favor, and the existence of material facts reasonably deducible therefrom. *Spring Garden Ins. Co. v. Riley*, 9 Md. 1; *Williams v. Woods*, 16 Md. 220; *Green v. Ford*, 35 Md. 82; *Tyson v. Tyson*, 37 Md. 567; *Kagel v. Totten*, 59 Md. 447; *Balto. & Ohio R. R. v. Keedy*, 75 Md. 320.

There was evidence for the consideration of the jury to prove negligence on the part of defendant. Before crossing Caroline street plaintiff looked, and neither saw nor heard any cars. The witness, Wetmore, saw plaintiff in the street when he was twenty feet from her; saw she was in danger and ran to aid her. If the motorman had been exercising the care required of him by law, he also would have seen her in time to avoid running against her. The motorman saw her when he was from thirty-five to forty feet from her, when she turned around, not to avoid the car, indicating that she was not aware it was coming, but to look for something she had dropped. Mrs. Noll said plaintiff was bewildered; the motorman could have seen her condition as well as the witness. The statement made by the witnesses for defendant that plaintiff walked against the side of the car, while it was moving, is improbable. In that way defendant undertakes to account for plaintiff's injuries. All the facts of the case were properly submitted to the jury, under the instructions, and the judgment ought to be affirmed.

BRISCOE, J., delivered the opinion of the Court.

This was an action brought by the appellee against the appellant for personal injuries alleged to have been sustained by her while crossing Caroline street, in the city of Baltimore. The verdict was for the plaintiff, and the defendant has appealed.

At the trial there was a special exception reserved to the

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granting of the first, second, third and fifth prayers of the plaintiff, for the want of sufficient evidence to sustain them. This exception is not signed by the Judge, and not being properly before us, the questions raised by the facts cannot be considered by us. In the case of *Nat. Bank of Chester Co. v. Armstrong*, 66 Md. 119, we said: "But we do not decide what would have been our determination of this question, if the facts set out in this certificate were properly before us, because we are all clearly of opinion that we cannot consider them. This Court is strictly an appellate tribunal, and on an appeal in a civil suit like this, the facts of the case and what occurred at the trial can be legitimately certified to us only through the medium of bills of exceptions taken to the rulings of the inferior Court, regularly signed by the Judge; and our duty is confined to a review of these rulings. On such an appeal, what is outside of the exceptions is outside of the record. There is no statutory or other legal authority for the certification of facts to this Court in such a case by means of a certificate like this. In every such case the judgment must stand or fall, according as the rulings excepted to are decided to be correct or erroneous, unless it appears that the party appealing has suffered no injury by an erroneous ruling against him, and this must appear solely from the verdict and the rulings and facts embodied in the exceptions."

The defendant's second and third prayers were granted in connection with the plaintiff's fifth prayer, but its first prayer was rejected, which asked the Court to instruct the jury that there is no evidence in the cause legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. And the sole question here is, was the evidence adduced legally sufficient to show that the plaintiff was injured by the negligence of the defendant or that of its agents. It is the settled law of this State, as well as in England, that the legal sufficiency of evidence is a question of law for the Court. The onus of proving that the injury was caused by the negligence of the company, is on the

plaintiff, and if there be no evidence legally sufficient for that purpose, there can be no recovery.

The evidence here shows that the plaintiff was an old woman seventy-seven years of age and very deaf—so deaf that she could not hear the bells rung upon the cars in the streets adjoining the Court House, although her attention was called to them. She heard the counsel in the case with difficulty. She testified that on the afternoon of March 28th, 1893, "She left her daughters to start up Caroline street, in the city of Baltimore, the way she had often gone; that she always looked at the crossings; that she walked across, and that was the last;" that she attempted to cross Caroline street, above the flagging at Monument street, and was struck by the car on the left side of the nose and face. She could not tell how far she went up Caroline street before she crossed, nor how she fell, nor how she was struck. She heard no bell. The witness, Wetmore, testified on behalf of the plaintiff, that he was on the southwest corner of Monument and Caroline streets, and about twenty feet from the place where the accident occurred; that the plaintiff was struck by the brass handle on front of car; that he did not hear the bell ring. The witness, Carroll, who was with Whitmore at the time of the accident, also testified that he heard no bell; that he could have heard it if one had been rung. The testimony on the part of the defendant is to the effect that the bell was rung; that Caroline street is a wide street, where a car can be seen for a long distance; that the plaintiff never was on the tracks, nor in front of the car, but that she walked into the side of the car, and was struck while walking toward the track; that there was no negligence on the part of the company; that the car was not going when she walked into the car.

Now, upon this evidence, we think the Court was right in not withdrawing the case from the jury. The first prayer was in the nature of a demurrer to the evidence, and was a concession of facts, but a denial of their legal sufficiency. It is obvious that the material facts in this case are conflict-

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ing, and the plaintiff was entitled to have the whole evidence passed upon by the jury. In the recent case of *B. & O. R. R. Co. v. Keedy and Snyder*, 75 Md. 324, we said: "The evidence may not have been of such a character as to convince all minds that there was culpable negligence on the part of the appellant's agents, but if there was any evidence from which a jury might honestly reach a conclusion, then there was no error in allowing the jury to consider it."

There was evidence tending to show that the bell was not rung, and that the plaintiff was not struck by the car, as testified to by the defendant's witnesses. These were material facts and questions properly left to the jury. We only deem it necessary to cite a few of the leading cases applicable here. *Baltimore Traction Company v. Wallace*, 77 Md. 412; *Kean v. Balt. & Ohio R. R. Co.*, 61 Md. 167; *Tyson et al. v. Tyson*, 37 Md. 582; *Green v. Ford*, 35 Md. 86.

We have carefully examined the other prayers granted by the Court, and find them correct. They contain the correct principles of law applicable to this case. *Baltimore Traction Company v. Wallace*, 77 Md. 437.

It follows from what we have said, that this case was properly left to the jury and the judgment will be affirmed.

*Judgment affirmed with costs.*

(Decided December 19th, 1894.)

CROOK, HORNER & CO. *vs.* BALTIMORE AND  
OHIO RAILROAD AND OTHERS.

*Warranty of an Ice Machine—Waiver of Strict Performance—Recoupment—Receivers' Certificates—Novation.*

Where the contract for the purchase of a certain machine specifies what it shall be capable of performing, and the maker agrees to run the same for a number of days after completion to demonstrate its efficacy, such stipulations constitute a warranty which is not waived by use of the machine, and the damages sustained by a breach of the warranty may be recouped in a suit by the seller for the price.

In such case, the sale of the machine by a trustee under a mortgage executed by the buyer of all of its property is not such an acceptance of the machine as excuses the seller from a performance of his contract, or entitles him to recover the contract price.

Where one party agrees to perform certain work upon machinery, and the plaintiff, with the concurrence of all the parties, agrees to complete the work according to that contract and be entitled to the payment promised the original party, the plaintiff's rights and liabilities are the same as those of the original contractor.

A contract for a certain machine, warranted to be capable of doing specified work, was made by A. with the Receiver of a corporation; and subsequently Receiver's certificates of indebtedness to the amount of the contract price were issued, upon the faith of a guaranty by the plaintiff to perform A.'s contract. The machine was not put in running order according to the contract, and was sold under a decree. *Held*, that the plaintiff was not entitled to enforce payment of the certificates, since the condition upon which they were issued was not performed.

Appeal from an order of the Circuit Court for Anne Arundel County (JONES, J.), sustaining exceptions to an auditor's account, distributing among creditors the funds of the Bay Ridge Company, and disallowing the claim of the appellants. This claim arose out of certain contracts between the Receiver of said company, appointed by said Court, and one Wm. H. Pitcher and the appellants, who became substituted, by agreement, to the rights and liabili-

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ties of Pitcher under his contract with the Receiver. On May 15, 1890, Pitcher agreed to erect and equip in working order, within thirty days, a machine for making ice of a clearly specified capacity, and the Receiver agreed to pay for the same the sum of \$4,500, in different instalments, the last of which was to fall due on September 1, 1891. This contract was not performed by Pitcher, and on November 10, 1890, an agreement was made between the Receiver and the appellants, which is set forth in the opinion of the Court. Two of the certificates therein mentioned were paid, but to the allowance of the remaining two in the auditor's account, distributing the proceeds of the sale of the property of the Bay Ridge Company, the appellee and other creditors excepted.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

*Robert H. Smith and Alfred S. Niles* (with whom was *Oscar Wolff* on the brief), for the appellants.

The legal effect of the contract made between the Receiver and Crook, Horner & Co. is (a) that the machine was accepted by the Receiver; (b) that the Receiver's certificates were given Crook, Horner & Co. in full *payment* for it; (c) that Crook, Horner & Co. gave their *promise* and *agreement* that they would put the machine in good working order by May 15, 1891, and would cause the machine to comply with the requirements of the Pitcher contract.

These promises are on either part clearly independent covenants. The Receiver's certificates are direct obligations, sanctioned by the Court, for the payment of money. The holder of them has a right to ask for payment. The contract by Crook, Horner & Co. to put the machine in a certain condition is, in like manner, a direct obligation upon them and they are responsible to the Receiver for any damages caused by non-fulfillment of this promise. We may concede that, to avoid circuity of action, such damages



as the Receiver might sustain can be deducted from the amount of the certificates, if the certificates still remain in the hands of a party to the contract. But a breach of their part of the contract by Crook, Horner & Co., could, by no possibility, *ipso facto*, give the Receiver a right to refuse to pay notes given for the machine, which had been accepted and actually sold by him, and for which these very notes are said to be full payment. If this be so, then *prima facie* the appellants here are entitled to recover on the certificates, and upon the Receiver is laid the burden of proof to show that the appellants have broken their contracts, and to what extent he has been damaged by such breach.

The fact that after Crook, Horner & Co. had *contracted* to put the machine in working order, and had *guaranteed* that it should accomplish certain work, the machine was accepted, and that the bonds were given in payment, appears on the face of the petition, the Court's order and the contract itself. They made the contract and gave the guaranty and received the bonds on or about November 10, 1890. Nothing then remained except for the Receiver to pay his debt authorized by the Court, when it fell due, and for Crook, Horner & Co. to make the machine come up to the guaranty. If Crook, Horner & Co. failed to do this, the Receiver could employ some one else to do it for them, and charge them with the extra expense.

A clearer case of independent covenant could not be found; and on independent covenants, such are the unquestioned rights of the parties. *Central Trust Co. v. Arctic Ice Machine Co.*, 77 Md. 237; *Hercules Iron Works v. Dods-worth*, 57 Fed. Rep. 556; *Carter v. Scargill L. R.*, 10 Q. B. 564; *Parsons on Contracts*, (8th ed.) vol. II, page 680.

The exceptants (a) have not given any evidence to show any damage by a breach of their contract by the claimants, (b) nor have they attempted to show a breach. These appellants guaranteed not that the machine was in a condition to do the promised work, but that if it were not they would put it into that condition. Before a breach of this contract

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can be made out it must be shown that the machine neither did nor could produce the guaranteed results, or else that the appellants neglected, upon request, to put it into the proper condition.

We contend that this is a case where a party accepted a machine and gave his obligation in payment therefor, securing himself by an independent stipulation or contract with a responsible firm; that he treated the machine as his own, and finally sold it; that the responsible firm has never been in default in carrying out or tendering its willingness to carry out the stipulation entered into by it; and that consequently there is no reason why his obligation should not be paid. If this Court should agree with us, we ask that the order be reversed, with a direction that the auditor's account, so far as it allowed our claim, shall be ratified. But even if this Court should hold that we were in default, we would then submit, with all confidence, that the order should be reversed, and the account, as stated by the auditor, ratified; because the Court must not only find us in default, but must also find a damage to the Receiver which is capable of ascertainment. *Campbell Printing Press Co. v. Thorpe*, 36 Fed. Rep. 415. In this case there is no such damage.

*Herbert H. Preston* (with whom were *John K. Cowen* and *Hugh L. Bond, Jr.*, on the brief), for the appellee.

Crook, Horner & Co. agreed to make a machine, with which they were familiar, work in a place which they had examined, with a supply of water, of which they knew the character and quantity. They were supposed to know what was necessary, the other parties did not. The machine had a fair test, of which careful notes were taken; it did not do the work and Mr. Crook admits it. Their superintendent did not know what was the matter, nor did the expert, as far as we are informed.

They now make indefinite objections to the temperature of the water and the imperfect fitting of the rooms. They knew that they were to have bay water, and they had

plenty of it ; they cut off the rooms complained of and still it wouldn't work. Mr. Crook seeks to create the impression that there was really no test of the machine. The correspondence and Mr. Mezick's testimony and memoranda disposes of this. The opinion of the learned Court below covers the case fully, and is well supported by the evidence.

PAGE, J., delivered the opinion of the Court.

This appeal is from an order of the Court below, sustaining the exceptions of the appellees to the allowance by the Auditor of the claim of the appellants. On the fifteenth day of May, 1890, Charles Webb, the Receiver of the Bay Ridge Company, through his agent, Hugh L. Bond, Jr., contracted with a certain William H. Pitcher for the purchase of an ice machine, to be furnished within thirty days, with capacity for making one and one-half tons of ice per day, and for cooling to a temperature of thirty-two degrees Fahrenheit, in all weathers, certain specified spaces in the restaurant building at Bay Ridge. By the agreement Pitcher guaranteed the capacity and character of the machine, and agreed to run the same for ten days after completion to demonstrate its efficiency ; the Receiver to supply the water and steam required. The price of the machine was to be \$4,500, to be paid in instalments at different periods, with interest thereon from the date of acceptance, to be secured by notes endorsed by the B. & O. Railroad Co., or some individual endorser satisfactory to said Pitcher.

It was also agreed that the property in the machine should remain in Pitcher until the delivery of the notes, endorsed as stated ; and these were not to be given until the machine was complete and working to the satisfaction of Mr. Bond. Pitcher put up the machine during the summer of 1890. On the thirtieth day of October, of the same year, the Receiver reported to the Court, that " while the machine was partially operated the season of 1890, it

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was not completed and working as required until after the close of the season, and your Receiver did not escape all expense on account of ice, as he had hoped. Your Receiver has therefore agreed with said Pitcher, subject to the approval of this Honorable Court, to accept the said machine and apparatus; *provided*, the said Pitcher shall obtain the contract and agreement of Messrs. Crook, Horner & Co., a responsible firm of the city of Baltimore, to put the same in good working order at the beginning of the season of 1891, and to guarantee the same, shall in all respects comply with the requirements of the said contract between the said Receiver and said Pitcher, as well when operated during the summer months as at other times, and to pay for the same the sum of \$2,000, on or before the 10th of July, 1891, and \$2,000 on or before Sept. 1st, 1891, the balance in cash." By an order passed on the 31st of October, the Court approved of the proposed contract and authorized him to issue his certificates of indebtedness bearing six per cent. interest per annum, to meet the deferred payments. On the 10th day of November ensuing, the Receiver entered into the following contract :

"Whereas, one William H. Pitcher did contract and agree with the said Receiver, by written agreement dated the 15th of May, 1890, to construct and supply ice making and refrigerating plant at Bay Ridge, Anne Arundel County, Maryland, of the description mentioned in said contract, a copy of which is hereto annexed, referred to and made part of this agreement; and whereas, the said machinery and plant were not completed within the time mentioned in said contract, and could not be tested at the time therein provided; and whereas, the said Pitcher and the said Crook, Horner & Co., as his assignees, are desirous of obtaining a settlement from the said Receiver, and the Circuit Court for Anne Arundel County has authorized said Receiver to issue Receiver's certificates to the amount of \$4,000, to pay for said plant; provided, said firm of Crook, Horner & Co. will contract and agree to put the said machinery and plant

in good working order at the beginning of the season of 1891, and guarantee that the same shall, in all respects, come up to the requirements of the said contract between said Receiver and Pitcher, as well when operated during the summer months as at other times. Now, \* \* \* in consideration of the delivery by the said Receiver of four Receiver's certificates, each for the sum of \$1,000, bearing, &c., &c., and the payment of \$293.15-100 in cash, in full settlement and payment for said ice machine and refrigerating plant, under said contract between the Receiver and the said Pitcher, the said Crook, Horner & Co. do hereby promise, &c., that they will put said machine and apparatus in complete working order at the beginning of the season of 1891, by the fifteenth day of May, and will cause the same to comply with and come up to, in all respects, the requirements of said contract hereto attached, as well when operated during the summer months as at any time."

The amount provided to be paid under this agreement, that is, \$4,293.15, was in full settlement for the machine and refrigerating plant, but it also comprehended payment for balance due for a pump located on the steamboat wharf. In pursuance of this contract, the cash provided for therein was paid, and certificates were issued payable to Pitcher, and upon being endorsed by him were delivered to the appellants. Two of these have been paid and the amounts due on the other two now constitute the appellee's claim. It also appears, that prior to Nov., 1890, Pitcher had become largely indebted to Crook, Horner & Co., partly on account of money advanced to carry out his contract with the Receiver. To secure this, Pitcher turned this account against the Receiver over to the appellants. At that time the Receiver's certificates had not been issued, nor, as appears by the contract of the appellees, as well as by the proof, had the machine been tested. Indeed, as far as the appellants were concerned, it was to enable them to secure the possession of these certificates that the contract of the

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10th of Nov. was entered into. The Receiver, by that contract, was to issue the certificates and pay the cash named; and Crook, Horner & Co., on their part, agreed to put the machine in complete working order at the beginning of the season of 1891, and in all respects comply with the requirements resting on Pitcher under his contract. The work Crook, Horner & Co. were to do, was the same that Pitcher's contract required him to do, and the money stipulated to be paid to them under Pitcher's contract could be due only upon the completion of the machines and after they had been tested and accepted according to the original contract. In other words, the consideration passing to Crook, Horner & Co., was the delivery of the Receiver's certificates, which Pitcher had agreed to turn over to them, and the duties they had imposed upon them were only to complete Pitcher's work on the machines. For greater certainty as to the nature of the transaction, the contract explicitly stated that the four Receiver's certificates, each for \$1,000, and the payment of the \$292.15 in cash, "were in full settlement and payment for said machine and refrigerating plant under said contract between the Receiver and said Pitcher."

The attitude of the appellants under this contract, therefore was that of a substitute for Pitcher. Having received the promise of the compensation, they assumed his obligations. It does not seem to be seriously contended that the machine was ever brought up to the requirements of the contract. Mr. Crook himself, stated that the machine had never been made to accomplish successfully the test required by the contract, and this is supported by the weight of the testimony. In 1891 work was delayed by the breaking down of the boiler until about the middle of June, and afterwards by the putting in of a larger smoke stack, until the middle of August, so that actual tests were begun about the last of August or the first of September, and were continued (according to Mr. Crook) until the 25th of September, when they were discontinued by agreement, because of the late-

ness of the season, to be renewed in the spring of 1892. That these tests were unsatisfactory is clearly shown, and Mr. Crook seems to admit this, when he says that in 1892 he came "to see Mr. Bond about starting up the machine, because they refused to pay these other two Receiver's bonds, and *we* were anxious, not only to get the bonds paid, but make the machine *work and come up to our guarantee.*" In 1892 the appellees were informed by Mr. Bond that "he did not have anything to do with Bay Ridge any more, that another company had it \* \* \* and they would not have any use for the ice machine that summer." And so no further effort appears to have been made to perfect the machine. On the 27th day of January, 1893, the machine, together with all the real and personal property of the Bay Ridge Company, was sold by Mr. Stockett, trustee under a decree passed in certain foreclosure proceedings by the Circuit Court for Anne Arundel County, sitting in Equity.

In view of what has been said, we think this is a case where a machine, having been ordered by the contractor, in an uncompleted condition, a third party, with the concurrence of the original contractor, agrees, in consideration of having received the obligations of the contractee for the whole purchase money, to complete it according to the terms of the original contract. And under these circumstances, the appellants having so agreed, and having taken such obligations, with stipulations so to complete the work, with a full knowledge of all the facts of the case, hold the obligations subject to such rights in favor of the Receiver, as would have existed had they remained in the hands of Pitcher, the original contractor.

Now, the original contract provides that the machines should have "capacity for making one and one-half tons of ice per day of twenty-four hours, and of cooling to a temperature of thirty-two degrees Fahrenheit, in all weathers, the following spaces," &c. And that Pitcher will run the same for ten days after completion, to demonstrate the char-

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acter and efficacy thereof. This was a warranty. An acceptance of the machine was no waiver of it, and, if having accepted it, there was a breach, the Receiver could either maintain an action for a breach of the warranty, or recoup the damages sustained in the vendor's suit. *Central Trust Co. v. Arctic Ice M. Co.*, 77 Md. 238. In this case there was no acceptance of the machine by the vendee. That it was taken possession of by the trustee appointed by the Circuit Court in the foreclosure proceedings, and with other property of the Bay Ridge Co., sold, is true. But this cannot be regarded as an acceptance by the vendee. To entitle the appellants to be paid, they must show performance on their part, or some legal excuse for their failure to perform, according to the terms of their contract, and having failed to show either, their claim should not be allowed.

*Order affirmed and cause remanded.*

(Decided December 19th, 1894.)



THE CITY AND SUBURBAN RAILWAY COMPANY  
*vs.* MINNIE MOORES AND CHARLES L. MOORES.

*Negligence—Independent Contractor—Turnpike Company—Nuisance  
per se.*

Where work is being done by an independent contractor, and an injury to a third person is occasioned by the negligence of his servants, yet the person for whom the work is done may be liable, if the injury is such as might have been anticipated by him as the probable consequence of the work let out to the contractor, or if it be of such a character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work.

The use of a steam engine on a turnpike road for hauling material to be used in repairs, is not such a nuisance *per se* as would make the Turnpike Company liable to third parties for the negligence of the servants of an independent contractor, having exclusive control of the engine and the work.

W. was employed by a Turnpike Company to grade the roadbed, etc., and also to construct the tracks of the defendant, an Electric Railway Company, on the road. Plaintiff sued the defendant to recover damages for an injury alleged to have been caused by the negligent use of an engine under the control of W. on the tracks of the defendant. *Held,*

- 1st. That W. was an independent contractor with the Turnpike Company, and the defendant was a party to the contract, if it be found as a fact, that the work was done for it.
- 2nd. That the use of a steam engine in doing the work under the contracts was not a nuisance *per se*, and neither the Turnpike Company nor the defendant was liable for the negligence of the servants of W., the independent contractor, provided W. employed competent men to do the work, and they were under his exclusive control.
- 3rd. That if the defendant company was not a party to the contracts between W. and the Turnpike Company, the mere fact that it owned the tracks on which the engine was run would not render it liable to the plaintiff.

Appeal from the Circuit Court for Baltimore County.

The plaintiff alleged that while driving on the Baltimore and Yorktown Turnpike Road her horse was frightened and

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Argument of Counsel.

made to run away, throwing her out of the vehicle, by the negligent manner in which an engine was used on the tracks of the defendant, an electric railway company. The defendant proved that the engine belonged to and was under the control of one J. G. White, and produced in evidence two contracts between the Turnpike Company and said White, by which the latter agreed to grade, pave and lay tracks on the turnpike according to certain specifications. This work was to be done under the direction and to the satisfaction of the company's chief engineer. At the trial the defendant offered two prayers, which are set forth in the opinion of the Court, and excepted to the action of the Court below (BURKE, J.), in rejecting them. The jury rendered a verdict for \$1,200 in favor of the plaintiff, and the defendant appealed from the judgment.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

*Geo. Dobbin Penniman* and *Milton W. Offutt*, for the appellant.

The President, Managers and Company of the Baltimore and Yorktown Turnpike Road, a corporation of this State, is the owner of a turnpike road extending northwardly from the city of Baltimore, through the village of Towson, to the northern line of the State. On the 10th day of September, 1892, this corporation made a contract with one J. G. White for the construction of a double track electric railway, from Baltimore to Towson, on a portion of the bed of the turnpike. It appears from the evidence that the Turnpike Company was having this work done for the City and Suburban Railway Company, the undisclosed principal in the contract. This work was not completed by the contractor and turned over to the Railway Company until September or October, 1893, two or three months after the accident for which this suit was brought. It will appear from an examination of the contract of construction, that the work of

building this new electric road was to be so done by the contractor, that the construction of the new railway was not to interfere with the running of cars on the railway line already established between Baltimore and Towson. The contract provides that "the contractor shall conduct the construction of the work herein mentioned in such a manner as not to interfere at any time with the operation of the railway lines;" and also provides for the regular road travel on the turnpike. The electric cars of the appellant began running on the railway, as at that time partially completed, but still in the contractor's hands in April, 1893, but the contractor still held the absolute right of way on the tracks for his construction cars. It would therefore appear that on the partially constructed tracks, which were still owned by the contractor, electric cars of the appellant were permitted to be run by the contractor, in pursuance of the clause in the contract above quoted, but in every other way the track was still in the absolute possession and control of the contractor under the terms of the construction contracts, which made him an independent contractor.

The accident was caused by a horse, attached to a buggy, and driven by the appellee, on the turnpike, becoming frightened at a small steam traction engine, which was pulling some cars filled with ballast, both engine and cars being owned by the contractor, and being engaged in the performance of his work under the two contracts set out in the record. The horse was going north and the engine approached, as it ran from the stone quarry near Towson towards him, going south. As the engine drew near the horse, the engine whistle was blown two or three times by the contractor's employee in charge. The whistling frightened the horse and the appellee was thrown from the carriage. There was no evidence offered of any kind to show that the engine was running rapidly, or that it was improperly constructed, or was not of the type usually employed by contractors for such work, or that it was in itself a nuisance.

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Argument of Counsel.

This is the simple question to be determined, therefore :

Is the appellant liable for the alleged negligence of White, the contractor. Is it a case where the rule of the immunity of the principal from responsibility for the negligent acts of the independent contractor should apply? The employment is independent when the person rendering the service represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Deford v. State*, 30 Md. 179; *Wood Railway Law*, 1152; *Mechem on Agency*, § 747.

The use of the engine was not a nuisance *per se*. *Butler v. Hunter*, 7 H. & N. 826; *Bailey v. Troy, etc., Co.*, 57 Vt. 252; *Cunningham v. Ry. Co.*, 51 Texas, 503; *Wabash, etc., Co. v. Farver*, 111 Ind. 195; *Macomber v. Nichols*, 34 Mich. 212.

*John Grason and John S. Ensor*, for the appellees.

The company defendant is bound to keep its tracks free from danger and dangerous machinery, consistent with its purpose and in consideration of the rights of third parties, and it cannot escape responsibility by proving the negligent act to have been committed by another, when it was primarily its duty to avoid such an occurrence, having full knowledge of the character of the cause and its tendency to endanger others in the exercise of their legal rights. *Parks v. The President and Managers of the Baltimore and Yorktown Turnpike Road*, 74 Md. 288; *Balto. v. O'Donnell*, 53 Md. 115. Such is the tenor of railroad law. The prayers ignore this obligation of the defendant.

The prayers are further misleading in that they ignore all obligation of defendant arising from the fact that it permitted a stranger to do its work, on its property, for its present use, profit and benefit, with full knowledge and acceptance. The word "control," used in the prayers, is too general and misleading, as it overlooks the considerations of permission, benefit, interest, participation and knowledge that arise outside of the theory of independent contract, and

also distinguishes it from 77 Md. 535. Defendant being the owner of property upon which men were doing work authorized by defendant, without contract with defendant, upon which to rely for defense of independent contractor, negligence and injury being proved in the course of that work, makes the party defendant in this case responsible. *Evans v. Davidson*, 53 Md. 248-249; *B. & O. v. Blocher*, 27 Md. 277; *Boone's case*, 45 Md. 344.

BOYD, J., delivered the opinion of the Court.

This suit was instituted by Minnie Moores and her husband against the City and Suburban Railway Company for injuries sustained by her through the alleged negligence of the defendant's agents. Whilst she was driving along the Baltimore and Yorktown Turnpike Road her horse was frightened at a steam engine, which was being used for hauling cars containing ballast to be put on the tracks of the Railway Company. The defendant introduced in evidence two contracts between the President, Managers and Company of the Baltimore and Yorktown Turnpike Road and one James B. White, by which the latter contracted to do certain work for the Turnpike Company, including the delivery of broken stone to be used in ballasting and back-filling the railway tracks constructed on the pike, and also in macadamizing the pike, and claims that the work was being done under these contracts by White as an independent contractor.

The defendant offered two prayers, which were refused by the Court below, which raise the only questions presented for our consideration. The first prayer asked that the jury be instructed, that if they found there was a contract between the Turnpike Company and White for doing certain work upon and adjacent to the bed of said turnpike offered in evidence; that said White conducted the work under the terms of said contract, without any interference on the part of the Turnpike Company or the defendant in

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mode or manner of doing the work ; and that the injury complained of resulted from the running of an engine engaged in the prosecution of the work, which belonged to and was under the control of said White, then the plaintiff could not recover. The second asked the Court to instruct the jury, that if they found that the Turnpike Company and White entered into the agreements offered evidence to do certain work therein set out ; that in the prosecution of the work White used approved and ordinary machinery, and employed competent and skillful workmen in the management and conduct of said machinery ; that the work was superintended with the usual and ordinary care incident to the same ; that the injury complained of was done during the prosecution of the work in the manner testified to by the plaintiff's witnesses ; that the employees in, on and about said engine were selected and employed by White and were under his exclusive control, then the plaintiff could not recover, although the jury may believe the whistle was blown on the engine as testified to by plaintiff's witnesses.

It will be observed that both of these prayers go upon the theory that White was a contractor to perform the work being done, which resulted in the alleged injury to Mrs. Moores, independent of and free from any control of the company as to how the work should be done, and hence the defendant was not responsible for the negligence of the servants of White. The general principles applicable to a case where work is to be done by a contractor, upon his own responsibility, who is not subject to the control of the employer as to the manner in which it is to be performed, are so familiar and well-established that it would be useless to go into any extended discussion of them. The difficulty generally is to determine who is to be regarded as the master of the wrongdoer under the facts arising in the particular case before the Court, and whether there is any such relation existing between the person for whom the work is to be done and the negligent party, as to hold the former

responsible for damages sustained by third persons through such negligence. Even if the relation of principal and agent, or master and servant, do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work.

This case presents some further questions, peculiar to itself, from the fact that the defendant is not a party to the contracts offered in evidence, so far as disclosed by them, and in this respect differs from the cases cited in argument. The testimony, however, is that the road was being constructed by White, at the time of the accident, for the defendant, and that the work was done under these contracts. It is true that there was nothing in the record to show just what the relations between the Turnpike Company and the defendant were, or how the latter became interested in the contract.

The Railway Company may have been an undisclosed principal, as contended by the appellant's counsel; the Turnpike Company may have owned the railway tracks when the contracts were made, or it may, as the owner of the turnpike road, have contracted for the work to be done on the railway tracks whilst doing the other work for it mentioned in the agreement, under some arrangement with the Railroad Company. But, however this may be, if the jury believed the work was being done by White under these contracts, we must assume, in order to enable the plaintiff to recover at all, that it was being done for the defendant, and must connect it with the contract. If that be not done, then clearly the defendant is not liable to the plaintiffs, and their only remedy would be against White or the Turnpike Company, if it is not relieved on the ground that White was an independent contractor.

The mere fact that the Railway Company owned the

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tracks on which the engine was being run in performance of those contracts, would not make it liable, and it would not be connected with the act which caused the injury to Mrs. Moores, for its mere permission to the Turnpike Company or its contractor to use the railroad tracks would not make it responsible. If, for example, White had simply contracted to deliver this stone for the purposes of the Turnpike Company in macadamizing its road, and the engine was being used for that at the time of the accident, it could not be successfully contended that the use of its tracks would have made the defendant liable. We must, therefore, treat the defendant as a party to the contracts, at least as a party having work done for it under them, in disposing of the prayers. Of course, it was for the jury to determine whether, as a matter of fact, the work was being done for White under the contracts, which facts the prayers submitted to the jury.

One way of testing the liability of the defendant, is to ascertain whether the Turnpike Company would have been liable, if it had been sued by the plaintiffs. Under the law, as settled in this State by the case of *Deford v. State*, 30 Md. 179, and the numerous decisions elsewhere, many of which are collected together in *Wood on Railroads* (ed. of 1894), p. 1152, it would seem clear that White was an independent contractor, and hence the Turnpike Company would not be responsible by reason of any such relation as master and servant. But, if that be conceded, the question arises whether it owed such a duty to the public, as a Turnpike Company, as to require it to see that no injury be sustained by persons traveling over its road, through the negligence of the servants of the contractor employed to do the work. It was said by the Court in *Park's case*, 74 Md. 282, that this Turnpike Company was bound to keep its road in proper repair and safe condition, just as municipal corporations are required to see that their public roads and streets are kept safe for travelers. In *O'Donnell's case*, 53 Md. 110, the city of Baltimore was held liable for an accident which



resulted from a rope being stretched across the street which was being repaired. A lantern had been hung on the rope but was shortly afterwards broken by some boys and not replaced. The city claimed freedom from liability because the work was being done by an independent contractor, but it was held responsible because of the duty imposed on it to have the work done properly, and have precautions against accident observed. In the case of *Water Company v. Ware*, 16 Wall. 566, the liability of the employer, who owes a duty to the public, either under the law or by contract, is fully discussed, and there are many cases in this country and England on this subject. They are to the effect that "when the employer owes certain duties to third persons or to the public in the execution of a work, he can not relieve himself from liability *to the extent of that duty*, by committing the work to a contractor."

The evidence of Kinsley, the superintendent in charge for White, shows that "the machinery used in and about the work was of the ordinary kind used for such purposes;" and contract No. 2 requires the contractor "to make all necessary connections with present track to run cars to crusher." We think, therefore, that the Turnpike Company had reason to believe a steam engine would be used in the execution of the work. But the use of the steam engine on that road was not a nuisance *per se*, and there was no such obligation on the Turnpike Company to the plaintiff or to the public as to prohibit it from using or permitting it to be used for hauling material for repairs or improvements. There was, therefore, no reason why that company could not make these contracts with White, although it knew he was going to use a steam engine such as this. In *Ware's case*, *supra*, although the plaintiff's horse was frightened by the alleged negligent use of a steam drill, yet the injury sustained was really caused by the material, dirt, &c., which had been left in the street, and which came within the duty of the defendant to persons travelling on the streets to see that they were kept safe. So in *O'Don-*

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*nell's case*, 53 Md. 110. If Mrs. Moores had been injured by piles of stone or other material negligently left in the road by the contractor, then a different question might arise. But the evidence shows that the injury was sustained by the negligent use of the engine in not stopping it and in blowing the whistle as she approached.

It would be carrying the obligation of the Turnpike Company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White were not thus negligent, although the use of the steam engine was not a nuisance *per se* and could be operated so as not likely to do any injury to any one using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to and not a probable consequence of the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants.)

As there was no such duty resting on the Turnpike Company, it follows *a fortiori* that there was none such on the appellant. As we have determined that White should be treated as an independent contractor with the Turnpike Company, and that the Railway Company must be regarded as a party to the contracts, if the jury found that the work was being done under them, we think the second prayer should have been granted. The first is perhaps too general, although intended to raise the same question, but as there was error in refusing the second, we must therefore reverse the judgment.

*Judgment reversed and new trial awarded.*

(Decided December 19th, 1894.)

LUTHER T. MILES ET AL., COUNTY COMMISSIONERS OF  
SOMERSET COUNTY, AND SAMUEL H. COULBOURN  
vs. IRA E. STEVENSON.

*Removal of Public Officers—Notice of Charges—Road Supervisors—  
Mandamus to Restore to Office—Appeal from County Com-  
missioners.*

A writ of *mandamus* lies to compel a board of County Commissioners to restore to his office a supervisor of roads, whom they had removed from office before the expiration of the term for which he was appointed, upon an *ex parte* proceeding, and for a cause not authorized by the statute creating the office.

Under the local law of Somerset County, a supervisor of public roads is appointed for two years by the County Commissioners, and they are authorized to remove him from office for incompetency, wilful neglect of duty or misdemeanor in office. Before the expiration of petitioner's term of office, the County Commissioners removed him without notice, because it was alleged that his charges for work were higher than those for which another person offered to do the same work. Upon a petition for a *mandamus* to restore the petitioner to office. *Held,*

1st. That the County Commissioners had no power to remove the petitioner for any other cause than one of those enumerated in the statute.

2nd. That before being removed, even for any one of those causes, he was entitled to notice of the charges against him and an opportunity to be heard.

3rd. That the petitioner having been removed for a cause not enumerated in the statute, and without notice, the action of the County Commissioners was a nullity, and he was entitled to a writ of *mandamus* to enforce his restoration to office.

If the Commissioners had acted within the scope of their authority, and had removed the petitioner for any of the causes specified in the statute, after having given him due notice and an opportunity to be heard, their action would not be open to review upon an application for the writ of *mandamus*.

It is a despotic denial of justice to strip an incumbent of his public office before its prescribed term has elapsed, except for legal cause, alleged and proved upon an impartial investigation after due notice.

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## Statement of the Case.

The provisions of Code, Art. 5, sec. 81, providing for an appeal to the Circuit Court by any person aggrieved by an order or decision of the County Commissioners, does not disentitle the petitioner in this case to the remedy by *mandamus*, since that provision does not embrace an appeal from the action of the County Commissioners in removing a road supervisor.

Appeal from an order of the Circuit Court for Somerset County (PAGE, C. J.), directing a writ of *mandamus* to issue. The case is stated in the opinion of the Court. At the trial the petitioner (appellee) offered the following prayers :

1. The petitioner prays the Court to find as matter of law, that if they shall find from the evidence that the County Commissioners, the defendants in this cause, removed Ira E. Stevenson from office as supervisor of the roads mentioned in the petition, because the bid of Samuel H. Coulbourn, as supervisor for the same district, was for a less sum of money than the per diem of the said Ira E. Stevenson, or because the said bid of Samuel H. Coulbourn was less than Ira E. Stevenson, the petitioner, was willing to do the work of supervisor for, then the Court must, upon said finding, render their verdict in favor of the petitioner.

2. The petitioner prays the Court further to find, as matter of law, that if they shall find that the objection of the County Commissioners to Ira E. Stevenson, on which his removal was based, was the fact that his bills as supervisor were larger than in their judgment they should have been, then such finding is not evidence that he was discharged by them for incompetency.

3. The Court is further asked to find, as matter of law, that if they shall find that the petitioner was removed from the office of supervisor for the causes set out in the petitioner's first and second prayers, before the end of the term for which he was appointed and without being, in the opinion of the County Commissioners of Somerset County, otherwise incompetent, negligent of duty or guilty of malfeasance in office, then said removal was without warrant of law and is null and void, and the petitioner is entitled to his

said office, notwithstanding his attempted removal therefrom.

And the defendants offered the following prayers or instruction :

1. That there is no legally sufficient evidence in this case to sustain the allegations of the plaintiff's petition, and the verdict must be for the defendants.

2. That if the Court, sitting as a jury, find from the evidence in this case that the commissioners for Somerset County, on the 3d day of July, 1894, removed from the office of road supervisor of said county Ira E. Stevenson at a regular meeting of said commissioners, at which all the members were present, and entered upon their record of proceedings, "Samuel H. Coulbourn was appointed in place of Ira E. Stevenson, removed for cause," then it is not competent to enquire further into the action or motive of said commissioners, and the verdict must be for the defendants.

3. That if the Court, sitting as a jury, find from the evidence in this case, that the County Commissioners for Somerset County, on the 3d day of July, 1894, removed from office of road supervisor for Somerset County Ira E. Stevenson, at a regular meeting of said commissioners, at which all the members were present, and entered upon their record of proceedings, "Samuel H. Coulbourn was appointed in place of Ira E. Stevenson, removed for cause;" and if they further find that the cause for which said Stevenson was removed (as explained and testified to by the commissioners, Kelley and Adams), was overcharging the county for services and material furnished while acting as Road Supervisor, then their verdict must be for the defendant.

The Court granted all the plaintiffs' prayers, and rejected all the prayers of the defendant, and the defendants appealed.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*Joshua W. Miles* and *Alonso L. Miles*, for the appellants, submitted the cause on their brief.

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Argument of Counsel.

The objection raised by the answer that *mandamus* is not a proper remedy in this case, should have been sustained, and the petition dismissed, first, because by section 81 of Article 5 of the Code of Public General Laws of Maryland, any person feeling himself aggrieved by any decision or order of the County Commissioners, may appeal to the Circuit Courts, &c., at any time within sixty days after the time of making such decision or order. The minutes of the County Commissioners show that an order was passed removing the appellee from office; (see evidence.) From this order he could have appealed to the Circuit Court or the county, and where the right of appeal is given by statute, *mandamus* will not lie. *Holland v. County Commissioners of Balto. County*, 46 Md. 621, *Poe's Pleading and Practice*, vol. 2, section 710, page 622, the theory being that if there be any other remedy, either at law or in equity, the writ ought not to be issued. *Hardcastle v. Md. & Del. R. R. Co.*, 32 Md. 32; second, because the action of the County Commissioners in removing the appellee involved the exercise of judgment and discretion, and, therefore, cannot be reviewed by *mandamus*. See *Poe's Pleading and Practice*, vol. 2, section 710, page 620, and cases there cited; also 53 Md. 544. As Mr. Evans expresses it in his work on practice, an act, the doing of which may be compelled by *mandamus*, must be "an act which a person is, at all events, bound to do, without any right to decide whether he will do so or not." *Evans' Practice*, page 530. Here the commissioners had the power to remove a road supervisor for incompetency, wilful neglect of duty, or misdemeanor in office, but they also had the right to decide whether they would do so or not. The action of the commissioners, therefore, in removing the appellee from office, essentially involved the exercise of judgment and discretion as to his competency, capacity and conduct in office. To review their action is of necessity to review their judgment, which can only be done, if at all, by appeal.

Now, as to the merits of the case, the whole testimony

produced on the part of the petitioner himself, is to the effect that when Stevenson made his report as road supervisor, the commissioners took exceptions to it for the reason that he had overcharged the county, and removed him for that reason. The duties of road supervisor are to see that the roads, bridges and underdrains are kept in good repair. To this end he is clothed with the power of receiving and disbursing the county's money, and is charged with the duty of keeping a correct and accurate account of money received and expended. For his compensation he is allowed two dollars per diem for each day of eight hours he is actually employed, and ten cents each for summoning men to work upon the roads. *Public Local Laws of Maryland*, vol 2, Article 20, sections 228 to 235, inclusive. The County Commissioners, whose special duty it is to manage the finances of the county and see that economy is observed, have a right to require of the road supervisors, not only that they should be faithful in rendering personal service, but that they should be men of judgment, who know the value of things which they are required to purchase for repairing roads, bridges, &c., and that they should be accurate and economical in the accounts which they render as well for money expended by them as for personal services. To say that the commissioners can not remove them for either ignorantly or wilfully rendering false or improper accounts is to take away the safeguard that is thrown around the financial department of the county and pave the way to extravagance and waste.

Road supervisors are subject to removal by the commissioners for incompetency, wilful neglect of duty or misdemeanor in office. *Public Local Laws of Somerset County*, Article 20, section 227. If they render false or improper accounts through ignorance, it is incompetency; if they do so wilfully, it is misdemeanor in office. But to discuss here what amounts to incompetency, neglect of duty, &c., is to substitute the judgment of the Court for that of the County Commissioners, which cannot be done; thus estab-

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lishing the original proposition for which we contend, that *mandamus* will not lie to review the judgment of the County Commissioners in this case.

All the prayers are upon the question whether the evidence made out a case of incompetency, wilful neglect, misdemeanor *vel. non.*, and even to consider them is to violate the principle of law that *mandamus* will not lie, where judgment and discretion are involved. If in the judgment of the County Commissioners the appellee was incompetent, negligent or guilty of misdemeanor in the conduct of his office or the keeping of his accounts, their judgment was final.

*Thomas S. Hodson* (with whom was *Clarence Hodson* on the brief), for the appellee.

McSHERRY, J., delivered the opinion of the Court.

This case had its origin in a petition filed by the appellee against the appellants, the County Commissioners of Somerset County, and one Samuel H. Coulbourn, praying for a writ of *mandamus*. The undisputed facts are: That in November, 1893, the relator, Stevenson, was appointed by the County Commissioners supervisor of certain public roads of Somerset County for the term of two years: That he accepted the office, gave bond and duly qualified: That thereafter, in July, 1894, the same County Commissioners appointed the appellant, Coulbourn, supervisor of the same roads in place of the appellee, whom they removed, as they allege, for cause. This removal was made without any trial or investigation and without notice to the appellee, and was induced solely because his charges for work were higher than those for which Coulbourn offered to do the same labor. The appellee's bill was paid by the County Commissioners and was not alleged to be illegal or in excess of the charges which he was authorized by law to make. Unless these charges for work performed furnished evidence of incompetency, wilful neglect of duty or misdemeanor



in office, there is no pretence that he was either incompetent, wilfully negligent of duty or guilty of misdemeanor in office. Upon the rendition of his bill, and without any formal accusation against him, and without any hearing, or even notice that a charge of any kind was pending against him, the County Commissioners removed Stevenson from his office, and assigned as the reason, that he was removed for cause, though they did not specify what that cause was. He thereupon made application for the writ of *mandamus* to restore him to his office, and after a hearing the writ was issued. From the order directing the writ to issue this appeal was taken.

We have no difficulty in affirming the order passed by the Circuit Court.

Stevenson, when appointed by the County Commissioners in 1893, was appointed to a public office, the term of which was a definite one prescribed by statute. *Code of Public Local Laws*, Art. 20, sec. 227; *Act of 1890*, ch. 113. Its duration was limited to two years and until his successor should be duly appointed and should qualify. This fixed it at two years at least, and as much longer as no successor was appointed and qualified. But the same statute made provision for the removal of a road supervisor before the expiration of the term for which he had been appointed. The power to remove was lodged with the same body which was entrusted with the power to appoint. This power to remove is not, however, unlimited or undefined; for the statute explicitly declares that it shall be exercised "for incompetency, wilful neglect of duty or misdemeanor in office." The designation in the statute of the three causes, which will authorize the exertion of the power to remove, is, of course, a denial of the right on the part of the County Commissioners to remove for any other or different cause. The incumbent, Stevenson, having been duly appointed, and being in consequence entitled to the emoluments of the office, had a right to insist that he should not be deprived by the appointing power of the office or its

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emoluments before the legal expiration of his term, except for the causes, or one of the causes, prescribed by the statute. Besides this, even had he been proceeded against under the statute for any of the causes therein set forth, he would have been entitled to an opportunity to be heard and to make defence before he could have been legally removed.

We agree that the writ of *mandamus* does not lie to control the discretion of any tribunal, however limited its jurisdiction may be. Hence, when the act complained of rests in the exercise of a discretion, the remedy fails. But this discretion is not unlimited, for if it be exercised with manifest injustice, the Court will command its due exercise. *Tap. on Man.* 14. It must be a sound discretion and according to law. *Ib.* 13. As said by CHIEF JUSTICE TANEY, in speaking of the power of a Court to disbar an attorney at law, "The power, however, is not an arbitrary or despotic one, to be exercised at the pleasure of the Court or from passion, prejudice or personal hostility." *Ex parte Secombe*, 19 How. 13.

If the County Commissioners had acted within the scope of their legitimate authority and had removed the relator for any of the causes specified in the statute, after having given him due notice and an opportunity to be heard, their action would not be open to review upon application for the writ of *mandamus*. Though the Code of Public Local Laws gave them plenary power to remove a road supervisor for incompetency, wilful neglect of duty, or misdemeanor in office, it conferred upon them no authority to deprive the relator of his office upon an *ex parte* proceeding founded on a cause not specified in the statute and carried on without notice to him and without according him an opportunity to be heard or to make defence. Such a procedure has neither the form nor the semblance of a judicial inquiry, and is contrary to the plainest precepts of natural justice. It lacks the essential prerequisites of a valid legal judgment, for neither could the County Com-

missioners have lawfully removed the relator for a cause not named in the statute, nor could he have been properly deprived of his office before its term had elapsed without due process of law, and due process of law in such instances imperatively requires that the person to be affected must have notice of the proceedings against him and must have an opportunity to be heard in his own behalf. *Fisher v. Keane*, L. R. 11, Ch. Div. 353; *Com. ex. rel. Burt v. Union League*, 135 Pa. St. 301. It is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income before its prescribed term has elapsed, except for legal cause, alleged and proved, upon an impartial investigation after due notice. In the case at bar the cause alleged was not one of those set forth in the statute, and for that reason the County Commissioners' act in removing the relator was a nullity. The order removing him was passed *ex parte*, without notice to or a hearing of the relator, and for that additional reason was utterly invalid. What we have said is not to be understood as applying to a class of cases where there is no limit fixed to the term of the office and the appointee holds merely at the will of the appointing power; nor to another class, where the power of removal is vested by statute in the discretion of any person or body of persons; nor where it depends on the exercise of personal judgment as to whether the cause for removal be sufficiently good. *State ex. rel. O'Neill v. Register et al.* 59 Md. 283.

It was insisted by the appellants that the writ of *mandamus* is not the appropriate remedy in this case, because by *sec. 81 of Art. 5 of the Code of Public General Laws*, any person feeling himself aggrieved by any decision or order of the County Commissioners may appeal to the Circuit Court within sixty days; and it was argued that this section affords a complete and adequate remedy for Stevenson. But to this we cannot agree. This section does not embrace an appeal from an order removing a pub-

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Opinion of the Court.

lic officer from his office. This is made quite apparent by recurring to the original legislation, which forms this section of the Code, and by reference to other Acts of Assembly providing for appeals from the County Commissioners in special instances. The *Act of 1853*, ch. 220, conferred upon the County Commissioners power to open, alter and close public roads, and by its 13th section gave the right of appeal to the Circuit Court in almost the exact language used in *sec. 81 of Art. 5 of the Code*. From this 13th sec. of the Act of 1853, the 81 sec. of Art. 5 of the Code was taken; and this section of the Code is the only provision of law allowing an appeal in a public road controversy. The prior *Act of 1834*, ch. 253, gave to the Levy Courts authority to open private roads, reserving a right of appeal to the then County Courts, and this provision is re-enacted in *Art. 25, sec. 117*. So the *Act of 1856*, ch. 308, made provision for building of bridges, and by its 9th section, which is codified in *secs. 32, 33 and 34 of Art. 25*, gave a right of appeal. The *Act of 1858*, ch. 271, which related to the draining of lands, gave by its 19th section a right of appeal, which is preserved in *sec. 71 of Art. 25*. Thus in each of these proceedings relating to private roads, to building bridges and to draining lands, the right of appeal given in the original acts is specifically preserved in Art. 25 of the Code; whereas, the right of appeal given by the *Act of 1853*, ch. 220, in proceedings to open, alter or close a public road, is not re-enacted in Art. 25 of the Code, but is codified in *sec. 81 of Art. 5*. Under the Constitution of 1851, road supervisors were made elective by the people. The *Act of 1853*, ch. 300, sec. 10, gave to the County Commissioners power to remove these officers for neglect of duty or malfeasance in office, but nowhere made provision for an appeal to the Circuit Court from an order revoking a supervisor's commission. An appeal could not then have been taken in such a case under the 13th sec. of ch. 220 of the Acts of 1853, which related solely to appeals in public road proceedings. So that when the power to re-

move a supervisor existed under the general law, there was no appeal provided, but now that the same power exists only under local laws and is no longer conferred by the general law, for sec. 10 of the Act of 1853, ch. 300, has been repealed, it is insisted and claimed that the 81 sec. of Art. 5 gives an appeal. But for the reason we have given, this cannot be.

It results, then, that sec. 81 of Art. 5 is not broad enough to include an appeal from an order removing a road supervisor, and was never intended to be, though we are not to be understood as intimating any opinion as to what other orders or decisions of the County Commissioners, if any, may be appealed from under this section.

From the views we have expressed, it follows that the Court below was right in granting the appellee's prayers and in rejecting those presented by the appellants, and its order directing the writ of *mandamus* to be issued, is free from error and must be affirmed with costs, which we accordingly do.

*Order affirmed with costs above and below.*

(Decided December 19th, 1894.)

Md.]

Syllabus.

BRADISH W. JOHNSON AND CHARLES E. DUCK  
*vs.* JOHN GLENN, JR., AND GEORGE WHITELOCK,  
ASSIGNEES.

*Mortgage Sale—Commissions of Mortgagee.*

Where mortgaged property is sold in pursuance of Code, Art. 66, sec. 6, under a power of sale contained in the mortgage, which authorizes the mortgagee to pay out of the proceeds of sale "all expenses incident to the sale;" neither the mortgagee nor his assignee is entitled to commissions for making the sale.

Appeal from an order of the Circuit Court No. 2, of Baltimore City (WRIGHT, J.) The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

*Fielder C. Slingsluff*, for the appellants.

*George G. Carey* and *John Glenn, Jr.*, for the appellees.

BRYAN, J., delivered the opinion of the Court.

A mortgage was made in the year eighteen hundred and seventy-nine, by Helen W. Johnson to John C. Backus, to secure the payment of eleven thousand dollars. By *mesne* conveyances, in course of time, it became vested in John Glenn, Junior, and George Whitelock, the appellees. The assignees have made sales of the mortgaged property, and the only question in this case is whether they are entitled to commissions for making the sale. In case of default the mortgagee, or John Glenn, his attorney, was authorized, by the terms of the mortgage, to sell the property and apply the proceeds of sale, in the first place, "to the payment of all expenses incident to such sale," and afterwards to the money

due on the mortgage, etc. The power to sell is derived exclusively from the agreement and contract of the parties to the mortgage. It is made effectual by section six of Article sixty-six of the Code of Public General Laws, and by the same enactment it passes to the assignees of the mortgage. Whatever rights the mortgagee or his assignees have in the premises arise from and depend upon the stipulations contained in the mortgage. We must look to that instrument to ascertain their character and extent. If, therefore, the words, "all expenses incident to such sale," include commissions, the assignees are entitled to receive them, but not otherwise. The assignees, in making the sale, were acting for their own interest. But they are nevertheless entitled to all expenses which were reasonably necessary and proper to enable them to make an advantageous sale. For instance, they ought to be allowed the services of an auctioneer, and the cost of advertising, and of other reasonable methods of obtaining an adequate price for the property. Such expenses as these may be justly considered as incident to the sale. But the payment of commissions to the assignees for attending to their own business could have no influence in promoting the sale, or in enhancing the price of the property. It would not in any way be accessory to the successful prosecution of the business in hand. It would simply be a gratuity for the personal benefit of the assignees. In *Rappanier v. Bannon*, decided at January term, 1887, but not reported, this Court had occasion to consider a claim for commissions made by a mortgagee, who had sold the property under a power of sale contained in the mortgage. There was no stipulation between the parties for the payment of commissions, and it was held that they could not be allowed. It was said: "This deed contained the agreement between the parties, and there is no provision in it giving the mortgagee a *right* to be allowed commissions, nor any language which seems to leave that question with the Court. If it had been the purpose of the contracting

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parties that the mortgagee should be paid the usual trustee's commissions in the discretion of the Court, it was very easy to have so provided."

The Court below allowed commissions to the assignees. We think that it committed an error, and we must therefore reverse its order.

*Reversed and remanded*

(Decided January 31st, 1895.)

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THE NATIONAL UNION BANK OF MARYLAND  
*vs.* THE NATIONAL MECHANICS' BANK OF  
BALTIMORE, ET AL.\*

*Assignment for Benefit of Creditors—Right of Creditor Holding Collateral Security—Partnership Real Estate—Creditor of Individual Member of Firm—Private Understanding of Partners as to Real Estate—Statute of Frauds—Estoppel.*

Where an assignment for the benefit of creditors has been made, a creditor who holds collateral security for the debt due him is not entitled to demand from the trustee a dividend on the whole amount of his claim without deducting therefrom the value of such collateral security.

A creditor who has sold the collateral held by him, after the assignment and before distribution by the trustee, is required to credit his claim with the net proceeds of such sale, and is only entitled to a dividend on the balance remaining due.

And if in such case the creditor does not sell the security held by him, the value thereof should be ascertained by proof and credited on his claim before distribution is made.

When the assignment has been made by a firm, a party who is both a creditor of the firm and of the individual members is not estopped to claim that certain real estate is individual and not firm property, because he recommended to the Court the ratification of the sale of

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\* With this case, as reprinted in 27 L. R. A., is a collection of authorities on the question when real estate is partnership property.



such real estate, when the person claiming such estoppel had induced the creditor to sign the recommendation by an assurance that his claim, then filed against the real estate as individual property, would not be affected.

When at the time a partnership was formed certain real estate was the individual property of the members, and nothing was afterwards done to transfer the same to the firm, except the making of entries in the firm books, by which the real estate was treated as firm property, and the fact that the copartners so considered it, then the proceeds of the sale of such real estate will not be treated in equity as partnership assets, when the question arises between the creditors of the firm and those of the individual members.

In such case, persons dealing with the members of the firm have the right, in the absence of notice to the contrary, to assume that the public records inform them correctly as to the ownership of the property, and are not bound by the private understanding between the partners themselves.

But if the real estate was such as was necessary for the convenient conduct of the business, was put into the business as part of the common stock and treated by the partners as partnership property, and was so entered on the firm books as to comply with the Statute of Frauds, then the partnership creditors should have priority over the creditors of the individual partners in the distribution of the proceeds of the sale of such property, provided the real estate was so used as to give notice to the latter that it was treated as partnership property.

Where real estate is purchased with partnership funds, for the use of the firm, it would be immaterial that the title stood in the names of the individual members, as a Court of Equity would treat it as firm property, and hence it would be liable to the partnership creditors to the exclusion of the individual creditors, until the former are satisfied.

Appeal from a *pro forma* order of the Circuit Court of Baltimore City, distributing a fund among creditors. Under the will of Wm. H. Hoffman, which was admitted to probate in Baltimore County in 1886, the residue of his property, embracing three paper mills, several farms and other real estate in said county, was devised to his four children, Lydia A. Smyser, Geo. W. S. Hoffman, W. E. Hoffman, and John W. Hoffman, and one-twentieth of the testator's estate was given to his son-in-law, P. Vonder-smith. Subsequently Vondersmith and L. A. Smyser conveyed their interest in said property to Geo. W. S., W. E.

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Statement of the Case.

and John W. Hoffman, as individuals, and said property was by them mortgaged to Mrs. Smyser.

Prior to the death of the testator, he, with his said three sons, were engaged in business under the firm name of Wm. H. Hoffman & Sons, and after his death his sons continued the business, using the same firm name. They then opened on their firm books an account headed "Real Estate," in which they entered all the property acquired by them under the will of their father, and continued the same on the books until the assignment hereinafter mentioned. The agreed statement of facts in the record set forth, "that between the said three sons all the said real estate was always considered in their business as copartnership property, and was treated between themselves as such, but that the title to the same appeared in the Land Records of Baltimore County, and in the office of the Register of Wills of Baltimore County, as having been derived by them under the will of their said father and the conveyances of said Vondersmith and Smyser, and no conveyance was made by them to the said partnership."

On October 27, 1893, the said Geo. W. S., W. E. and John W. Hoffman, partners, trading as Wm. H. Hoffman & Sons (their wives uniting), executed an assignment for the benefit of creditors to John B. Ramsay and S. P. Schott of all and singular the real and personal estate \* \* and all the other property of every nature and description of the said copartners, and all the separate estate of each of them, in trust for the payment of partnership and individual creditors, according to their respective right and interest therein. At a meeting of creditors, at which the deed of trust was determined upon, the said firm exhibited a balance sheet of their liabilities and assets, showing among their assets the following item: "Real estate account, \$164,600."

Upon the petition of the trustees under the assignment, the Circuit Court of Baltimore City assumed jurisdiction of the trust, and the usual notice to creditors was given. After

a part of the real estate had been sold, John B. Ramsay, one of the trustees, reported to the Court a private sale of the remaining part of the real estate, while the other trustee filed exceptions, stating that he was hopeful of being able in time to obtain a better price for the property than that reported. In order to obtain the concurrence of other creditors, Mr. Ramsay explained to the officers of the Union Bank that by the proposed sale the creditors of W. H. Hoffman & Sons would obtain about  $33\frac{1}{3}$  per cent. of their claims, and the said officers were told that their concurrence would not affect the claim of the Union Bank, but meant only an assent to the sale at the proposed price. Nothing was said as to claims against the real estate as individual or firm property; the Union Bank assented, and the sale was finally ratified.

The Union Bank's claim was upon two promissory notes, each for \$5,000, made by W. H. Hoffman & Sons, and endorsed by Geo. W. S. Hoffman, J. W. Hoffman and J. W. Hoffman, treasurer. As collateral security for each note, Hoffman & Sons had deposited with the bank bonds of the Gunpowder Valley R. R. Co. of the face value of \$7,500. The claim of the Union Bank was filed prior to any sale, against both the partnership and Geo. W. S. and J. W. Hoffman, endorsers on the notes.

The Union Bank excepted to the ratification of the Auditor's account distributing the trust fund, because the real estate in question was treated as partnership property; whereas, this exceptant alleged that it should have been allowed the full amount of its claim out of the proceeds of the sale of the real estate, because such real estate was owned by G. W. S. and J. W. Hoffman, individually, and they were individually liable to the exceptant as endorsers. The Mechanics' Bank excepted to the account, because, upon the claim of the Union Bank, no credit was given for the collateral security held by the latter; and, answering the above mentioned exception, alleged that the firm creditors were induced to acquiesce in the sale of

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the real estate, because the action of the Union Bank led them to believe that the proceeds of sale would be distributed as partnership assets, and that the Union Bank could not then claim that such proceeds should be treated otherwise.

A *pro forma* order of the Court below overruled the exceptions filed by the Union Bank, and sustained the exceptions filed by the Mechanics' Bank and others.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE and BOYD, JJ.

*John N. Steele and William H. Buckler* (with whom were *John E. Semmes* and *Francis K. Carey* on the brief), for the appellant.

The questions presented by this appeal are as follows; (1.) Is the Union Bank entitled to receive a dividend on the full amount of its claim, or should it be required to sell the bonds it held as collateral for the notes, apply the proceeds in payment thereof and file its claim only for the balance? (2.) Is the Union Bank estopped by its concurrence in the sale, as set out in the record, from now claiming that the real estate was not partnership property? (3.) If the Union Bank is not so estopped, was the said real estate partnership property, as against the individual or separate creditors of the members of the firm of Wm. H. Hoffman & Sons?

1. The appellant is entitled to receive a dividend on the full amount of its claim. While formerly some doubt existed as to whether the rule in bankruptcy—that the creditor was required to exhaust his security, and was only entitled to prove for the residue—did not also apply to the administration of an insolvent estate, the law would now seem to be well settled that the bankrupt rule does not apply and that the creditor is entitled to prove for the full amount of his claim, irrespective of any collateral security he may hold. *Bisph. Eq.*, sec. 343; *West v. Bank of Rutland*, 19 Verm.

403; *Brough's Estate*, 21 P. F. Smith, 460; *Findlay v. Hosmer*, 2 Conn. 350; *Shunk's Appeal*, 2 Barr. 304; *Blair & Shenk's Appeal*, 1 Norris (Pa.) 113, 116.

2. The concurrence of the appellant in the sale reported May 1st, 1894, does not estop it from now claiming that the real estate so sold was, so far as it is concerned, individual or separate, and not partnership property. *Hardy v. Chesapeake Bank*, 51 Md. 589.

3. The real estate derived by George W. S., W. E. and John W. Hoffman, under the will of their father, and sold by the trustees, belonged to and was held by them as tenants in common, and was not partnership property, and the proceeds of said sale should be first applied to the payment of their separate creditors. The property was not devised to the executors, but they were directed to have the property appraised by three disinterested persons, and the properties specifically devised to his three sons, therefore, vested in them, subject only to the contingency that the properties so devised should not respectively exceed in value one-fourth of the testator's estate, and that they might be charged with the annuity given to his wife. Of this, however, there is no evidence, and it is fair to assume, as the will assumes, that the estate was ample to provide for the annuity, without requiring any contribution from the properties specifically devised.

Shortly after their father's death, the three sons, deriving title to the various properties as above stated, "continued so to trade, using in their business the firm name as aforesaid." There were no written articles of copartnership, and so far as the record discloses, there was no distinct oral agreement. They seemed simply to have *continued* to trade as they had been doing in their father's lifetime. They at once opened on their firm books an account headed "Real Estate," in which they entered all the property derived by them as aforesaid, and continued the same on their books in that way. There was no deed of the property made by the sons to the partnership, nor any deed made by them as

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copartners, but they did, as individuals, execute two or more mortgages to Mrs. Smyser; and Peter Vondersmith and Mrs. Smyser conveyed their respective interests in the father's property to the sons, as individuals, and not as partners; and while the agreed statement recites that between the three sons the said property was considered copartnership property, and was treated between themselves as such, the only thing done by them is the entry made upon the firm books.

There is no question here of the purchase of property with the funds of the partnership for partnership purposes, but simply the question whether the entry on the firm books and the carrying on of the business on certain portions of the property are sufficient to convert individual into partnership property, as against individual creditors.

The doctrine that real estate purchased with partnership funds for partnership uses is, in equity, held to be partnership property, even if the title was put in the names of the partners as tenants in common, has its whole foundation in the fact that partnership funds, which were applicable to the payment of partnership creditors, furnished the consideration, and that equity will therefore raise a trust in favor of such creditors. And it would seem to be well settled, that "in the absence of proof of its purchase with partnership funds, for partnership purposes, real property, standing in the names of several persons, is deemed to be held by them as joint tenants, or as tenants in common;" and to make such property partnership property, it must appear that it was purchased with partnership funds, for partnership purposes. *Thompson v. Bowman*, 6 Wall. 316, 317; *Shanks v. Klein*, 104 U. S. 18; *Hammond v. Hopkins*, 143 U. S. 269; *Frink v. Branch*, 16 Conn. 260; *Hatchett v. Blanton*, 72 Ala. 423; *Alexander v. Kimbro*, 49 Miss. 529; *Richards v. Manton*, 101 Mass. 482; *Fall River Co. v. Borden*, 10 Cush. 460; *Chamberlin v. Chamberlin*, 44 N. Y. (Sup. Ct.) 116, 121, 123; *Pepper v. Pepper*, 24 Ill. App. 319; *Uhler v. Semple*, 5 C. E. Gr. 289; *Grubb's Appeal*, 66 Pa. St.

118; *Harrison v. Richter*, 3 Stock. 389; *Baldwin v. Johnson*, — Sax. 441; *Hiscock v. Phelps*, 49 N. Y. 97; *Fairchild v. Fairchild*, 64 N. Y. 471; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Paige v. Paige*, 71 Iowa, 318; *Messer v. Messer*, 59 N. H. 375; *Parker v. Bowles*, 57 N. H. 491.

The mere fact that parties carry on their business upon property owned by them as tenants in common, does not give it the character of partnership property, nor raise any presumption to that effect. *Buck v. Winn*, 11 B. Mon. (Ky.) 320; *Theriot v. Michel*, 28 La. An. 109; *Balmain v. Shore*, 9 Ves. 506, and cases above cited.

Even where real estate has been devised to partners as joint tenants, or as tenants in common, it will not be held to be converted into partnership assets. *Norris v. Barrett*, 3 Y. & J. 384; *Brown v. Oakshot*, 24 Beav. 254; *Steward v. Blakeway*, L. R. 4 Ch. 608; *Phillips v. Phillips, Bisset on Partn'p*, page 50. An examination of the cases that might at first be thought to be opposed to the principle just stated, will disclose that the decisions were founded on the fact that the real estate was absolutely indispensable to the business of the partnership. The case of *Waterer v. Waterer*, L. R. 15 Eq. 402, was a case where the land was held to be partnership property, because (1) the third son's share was purchased as partnership property, and (2) in the nursery business the land cannot be separated from the stock in trade.

If the real estate vested in the members of the firm by devise or descent, or if it was purchased with their individual means, then it can only become partnership property by an *express agreement in writing signed by the partners*. *Alexander v. Kimbro*, 49 Miss. 538; *Parker v. Bowles*, 57 N. H. 491, 496; *Otis v. Sill*, 8 Barb. 102, 122; *Bailey v. Hemenway*, 147 Mass. 326; *Benton v. Roberts*, 4 La. Ann. 216; *Bird v. Morrison*, 12 Wis. 138; *Ridgway's Appeal*, 3 Harris, 177; *Kepler v. Erie Dime Savings Bank*, 101 Pa. St. 602; *Holt's Appeal*, 98 Pa. St. 257. And the agreement should be recorded. *Hale v. Henrie*, 2 Watts,

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193; *Kramer v. Ortman*, 7 Barr. 170; *McDermot v. Lawrence*, 7 S. & R. 438.

The only cases in this State which seem to have any bearing on the appellant's third proposition, are: *Goodburn v. Stevens*, 5 Gill 1; *Ebert's Exrs. v. Ebert's Admrs.*, 5 Md. 357; *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 105; *Rust v. Chisolm*, 57 Md. 381.

The Statute of Frauds is in force in this State, and therefore the cases holding that to convert individual into partnership property, there must be an express agreement in writing signed by the partner in whose name the title stands, should in the absence of a decision by this Court, be of controlling authority. See also *Maccubbin v. Cromwell*, 7 G. & J. 163, 164; *Carson & Vickery v. Phelps et al.*, 40 Md. 99.

The Maryland Code, Art. 21, sec. 1, provides that: "No estate of inheritance or freehold, or any declaration or any limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided," and it is respectfully submitted, therefore, that this Court should adopt the rule of the Pennsylvania Courts, and require declarations of trust to be not only in writing, but to be recorded, in order for them to be effectual against "strangers, purchasers, mortgagees and creditors." It is believed that all the cases concede, that even where the title to real estate, purchased with partnership funds and for partnership purposes, is taken in the name of one of the partners, a *bona fide* purchaser of such property from the party in whose name the property stands, for value and without notice, would acquire a good title. Now, it is established by the decisions of this Court, that where property is mortgaged and the mortgage is not recorded within six months from its date, the mortgagee will be postponed to those creditors of the mortgagor, who become such after its date and without actual notice. *Nally v. Long*, 56 Md. 571; *Stanhope & Co. v. Dodge*, 52 Md. 494; *Pfeaff v.*



*Jones et al.*, 50 Md. 273; *Sixth Ward Build. Asso. v. Wilson*, 41 Md. 515.

*Randolph Barton* and *William Reynolds* (with whom was *Skipwith Wilmer* on the brief), for the appellees.

It was the duty of the Auditor to have ascertained the actual value of his collaterals and to have deducted this from the amount of the notes, and to have audited to the appellant a dividend upon the balance only. Such was the practice under the *U. S. Bankrupt Act of 1867*. See form No. 21, Proof of Debt with Security. Also the following cases: *In re Bridgman*, 1 B. R. 312; *In re Bigelow*, 1 B. R. 632; S. C. 2 Ben. 480.

This practice of valuing securities appears to have had its origin in the English rule in bankruptcy cases, as stated by Lord Eldon, *ex parte Smith*, 2 Rose 63. But Sir John Leach, M. R., in the case of *Greenwood v. Taylor*, 1 Russ & M. 185, says that "it is not founded as has been argued upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a Court of Equity in the administration of assets." The same practice has been adopted in Massachusetts. *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Metc. 159; *Middlesex Bank v. Minot*, 4 Metc. 325; *Trustee of Haverhill, &c. v. Cronin*, 4 Allen 141; so also in New Jersey; *Bell v. Fleming*, 1 Beas. 13, 25.

The real estate, under the circumstances of this case, should be treated as partnership property. *Lindley on Part.*, 643, 649; *Waterer v. Waterer*, L. R. 15 Eq. 402; *Robinson v. Ashton*, L. R. 20 Eq. 25; 1 *Bates on Part.*, secs. 280, 289; *Roberts v. McCarty*, 9 Ind. 16; *Smith v. Danvers*, 9 Ind. 16; *Smith v. Danvers*, 5 Sanf. 669; *Clark's Appeal*, 72 Pa. St. 142; *Osborn v. McBride*, 16 Bank. Reg. 22; *Paige v. Paige*, 71 Iowa, 318; *Page v. Thomas*, 43 Ohio St. 38; *Goodburn v. Stevens*, 5 Gill 2; *Shunts v. Allen*, 104 U. S. 18.

The appellant is estopped by its conduct from claiming that the real estate should be treated as separate property.

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It aided the trustee in bringing in all the creditors by holding out to them a dividend of  $33\frac{1}{3}$  per cent., which was only derivable by treating the real estate as firm assets. *Pickard v. Sears*, 6 Ad. & E. 475; *Butler v. Gannon*, 53 Md. 345; *Andrews v. Clark*, 72 Md. 434; *Homer v. Grosholtz*, 38 Md. 526; *Presstman v. Mason*, 68 Md. 89.

Boyd, J., delivered the opinion of the Court.

In October, 1893, George W. S. Hoffman, W. E. Hoffman and John W. Hoffman, partners, trading under the firm name of W. H. Hoffman & Sons, executed a deed of trust, in which their wives joined, to John B. Ramsay and Simon P. Schott, by which they conveyed all their property, "including all of the joint stock of the copartnership and all of the separate estate of each of the partners in trust, for the payment of partnership and individual creditors, according to their respective rights and interest therein."

The Circuit Court of Baltimore City assumed jurisdiction of the trust, and after the sale of the property, which will be more particularly hereafter referred to, an audit was made distributing the proceeds of sales, etc. The appellant held, at the time of the assignment, two notes of the firm, each being for the sum of five thousand dollars, and endorsed by George W. S. Hoffman and J. W. Hoffman, individually. With each note there were deposited bonds of the Gunpowder Valley R. R. Co., of the par value of \$7,500.00, as collateral security, with the usual authority to the bank to sell at public or private sale, in case of default. The appellant filed its claim for the amount of the notes, together with costs of protests, against the estates of the firm and of the individual endorsers. The National Mechanics' Bank of Baltimore excepted to the allowance by the Auditor of the claim of appellant, because it had not credited the value of the collateral security held by it, and the appellant excepted to the audit for the reason, as it alleges, that the real estate held and owned by the three members of the firm was their individual property, and not partnership assets.

An agreement was filed in which certain facts are admitted, and the Court below was authorized to pass a *pro forma* order sustaining the exceptions to the claim of the appellant and overruling those filed by it. A *pro forma* order was accordingly passed, and an appeal taken to this Court.

The principal questions presented for our consideration, are:

1st. Is the appellant entitled to a distribution on its whole claim, without crediting the value of the securities held by it as collateral?

2nd. Is the real estate held by the members of this firm to be treated as partnership or individual property, so far as the appellant is concerned?

If the appellant had sold the securities held by it between the dates of the assignment and the distribution, there could be no question about the right of the trustees or the creditors to require it to credit its claim with the net proceeds of such sale. The case of *Third National Bank v. Lanahan, trustee*, 66 Md. 461, has established that as the law of this State, whatever may be the effect of the decisions elsewhere, cited by the appellant, and it is a just and equitable rule. Such being the case, would there be any equity in permitting the appellant to receive a dividend on its whole claim, simply because it saw proper to delay realizing on its securities until after distribution was made? We think not. The creditor who holds collateral securities for his claim, has the advantage over other creditors to the extent of their value, or what he may realize upon them, but he should not be permitted to have in addition thereto, what in many cases might be equivalent to double dividends or even more. If, for example, the collaterals realized fifty per centum of the creditor's claim, and the debtor's estate would only pay fifty cents on the dollar, the creditor with the security would be paid in full, whilst the others would receive only one-half of their claims. Great inconvenience and cost would oftentimes follow the practice

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contended for in the distribution of insolvent estates, in addition to the undue advantage given the creditor holding the collateral. For if the whole claim be distributed to, and the dividend exceeded the difference between the value of the collaterals and the amount of the claim, the creditor would have to refund or deduct from his dividend the balance, which would require another audit, thus involving the estate in unnecessary cost and delay. The value of the collaterals would have to be ascertained before the dividend was paid to the creditor, so as to properly protect the insolvent estate, for if this be not done and the dividend was more than the difference between the value of the collaterals and the amount of the claim, the trustee would have to look to the creditor holding the collaterals for the excess paid him, and possibly the estate would sustain loss by not being able to recover the amount. The long established practice in proceedings of this kind in this State requires the creditor, in presenting to the Auditor *prima facie* proof of his claim, to swear "that no part of the money intended to be secured by such note hath been received, or any security or satisfaction given for the same, except what (if any) is credited;" following the language required for authenticating claims in the Orphans' Court. The claim in controversy in this case was supported by the affidavit of the cashier of the bank to the above effect. Such language is not meaningless, but was evidently inserted for the purpose of requiring the creditor either to surrender the securities or credit his claim with their value before it is distributed to.

The value of the securities thus held should be ascertained and credited on the claim before distribution is made. That can be easily done by relevant testimony, taken under authority of the Court, when no sale has taken place. This was the practice in bankruptcy proceedings, and is not without precedent in other Courts. See *In re Bridgman*, 1 B. R. 312; *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Metc. 159; *First National Bank v. Eastern*

*Railroad*, 124 Mass. 524, and *Bell v. Fleming*, 1 Beas. 13. There was therefore no error in the *pro forma* decree in regard to that ruling.

In considering the question as to the right of the appellant to have the real estate treated as the individual property of the members of the firm, and not as partnership assets, we must bear in mind the fact that W. H. Hoffman was the original owner of all this property, and that whilst it was thus owned by him he was in partnership with his three sons, trading under the name of William H. Hoffman & Sons, being the style of the firm subsequently adopted by them. If a deed of trust, similar to the one made by the sons, had been made in the lifetime of the father, by the members of the original firm, it would hardly be contended that the real estate should be treated as partnership property—certainly not as against the individual creditors of William H. Hoffman. By his last will and testament the senior Hoffman charged an annuity upon the "Gunpowder Mill" property, for the purpose of keeping a burying ground, etc., in proper condition, and made certain provisions for his wife. He directed his executors to ascertain the value of the rest of his property and gave it, with the exception of one-twentieth thereof left to Peter Vondersmith, his son-in-law, to his three sons and his daughter, Lydia A. Smyser, to be divided between them equally, share and share alike. He directed that in the division his son, John W. Hoffman, should have the property known as the "Gunpowder Mill," chargeable with the annuity aforesaid, together with certain water rights and four hundred acres of land connected therewith, known as "Paper Mill Hills;" also a part of the tract of the land known as "Laurel Hills," one hundred yards wide, on each side of a stream. He also directed that in the distribution his son, George W. S. Hoffman, was to have the "Marble Vale Mill" property, containing 218 acres, and his son, William E. Hoffman, was to have his "Clipper Mill," together with a tract of land called "Grist Mill Hills," containing 257 acres; also a tract

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called "Addition to Grant Mill Hills," containing seven and one-quarter acres, and some houses named by him. He provided that the property thus given to his three sons should be taken by them in the distribution at the prices or values fixed by the appraisers, as provided for in his will, and then directed "that all the rest of my property and estate not hereinbefore devised or specially distributed \* \* \* shall be sold or disposed of by my said executors \* \* \* and the proceeds of such sale or sales be so distributed among my said four children as to make the share of each, under these provisions of my will, equal the one to the other." Subsequently, his son-in-law and his daughter conveyed their respective interests to the three sons "as individuals."

It is admitted in the agreed statement of facts, that after the father died the three sons continued to trade under the firm name of William H. Hoffman & Sons, and opened on their firm books an account headed "Real Estate," in which they entered all the property so derived by them and continued the same on their books in that way; "that between the said three sons all the said real estate was always considered in their business as copartnership property, and was treated between themselves as such, but that the title to the same appeared in the Land Records of Baltimore County, and in the office of the Register of Wills of Baltimore County, as having been derived by them under the will of their said father, and the conveyances of said Vondersmith and Smyser, as has been hereinbefore stated, and no conveyance was made by them to the said partnership."

It must be conceded that there is nothing on the face of the will that would indicate any intention of the testator to vest the property in his three sons as partners; but, on the contrary, it is apparent that he intended them to own individually certain properties which he directed to be given them, as above stated. The property was, at the time the partnership was formed, the individual property of the three members. So far as the record discloses, nothing has since

been done to transfer the property to the firm or vest any interest in it, excepting the entries in the books and the fact that the real estate was considered in the business as co-partnership property, and so treated between the members, as above stated. We are therefore met with the inquiry, whether that is sufficient to authorize a Court of Equity to treat the proceeds of sale as partnership assets when called upon to decide between the creditors of the firm and those of the individual members.

If this property had been purchased with partnership funds for the use and on account of the firm, it would be immaterial that the title stood in the name of the individual members, as a Court of Equity would treat it for all the purposes of the partnership as firm property, and hence it would be liable to the partnership creditors to the exclusion of the individual creditors until the former are satisfied. In that case there would be an implied or constructive trust in favor of the partners as such, which would inure to the benefit of the creditors of the firm. But when it has been acquired in the manner above stated, the question arises whether those dealing with the members of the firm have not the right, in the absence of some notice or knowledge to the contrary, to assume that the public records inform them correctly as to the ownership of the property, notwithstanding the private understanding between the partners themselves. Creditors have sometimes suffered great hardships by Courts of Equity declaring property standing in the name of one person to be in trust for the benefit of others, but such decisions are rendered to prevent injustice being done those whose money purchased the property, and relief is only granted to them when their claims are established by clear, direct and explicit proof. This Court has said, "This strictness of proof is required because of the danger of rendering titles depending upon deeds and other written documents insecure." *Witts v. Horney*, 59 Md. 586.

The same reasoning applies to real estate held of record by members of a firm as tenants in common. When it is

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sought to change such property from individual to partnership property, the record evidence all pointing to it being the former, a Court of Equity should not act upon doubtful proof, particularly when the rights of strangers or third parties are to be affected. The public records will be of but little avail, if the private books and intentions of partners are to entirely control and determine the character of ownership of real estate.

If property is purchased with partnership funds, and conveyed to one or more of the partners as individuals, the entries of the firm books would have great, possibly controlling, weight, as to whether it should be treated as partnership or individual property, but Courts should require more than private entries and understandings between partners to overcome the public records in cases such as this. No one would suppose, from reading the will of William H. Hoffman, that the property belonged to the partnership. Persons dealing with the individual members would be led to believe from that will that they owned the property individually, and inasmuch as it was once the separate property of the members, we are not prepared to break down all the safeguards and protection intended by our Registry Acts by announcing as the law of this State that partners can so change the character of real estate, originally owned by them as individuals, and not in any way derived from the partnership, as to give priority to firm creditors over their separate creditors simply by making entries in their books and treating it between themselves as partnership property, without giving some notice or doing some acts equivalent to notice, to their individual creditors. The agreed statement of facts does not show that the appellant had notice of any facts that should have put its officers on inquiry. The statement is not as full as it might have been. It does not even show what business the firm was engaged in, but from the arguments, and what we gather from the record, we assume that they were manufacturing paper. Nor is it definitely stated whether the business was conducted in one or more paper mills, although it is shown



that William H. Hoffman died owning real estate, consisting of three paper mills, farm lands, etc. It would certainly have been much more satisfactory if the facts had been fully set out so as to enable the Court to understand the exact character and extent of the use of the real estate by the firm. But it is admitted that the property was acquired under the will of William H. Hoffman and by the deeds of Mr. Vondersmith and Mrs. Smyser, and that no conveyance was made by the members of the firm to the partnership. As to what uses, if any, this firm engaged in manufacturing paper, made of the farm, dwelling houses and other property not necessarily incident to the paper mills, the record is silent, but it is certain that without some notice that they were treated as partnership property, no one dealing with the individual members of the firm would be expected to so regard it, and the ordinary use of that kind of property, such as cultivating or renting the farms, occupying or renting the houses, &c., would not put creditors on inquiry or be sufficient notice that they were treated as partnership property.

If the paper mills themselves, and such other real estate as would properly be used in connection with them, were treated by the partners as firm property, and were so used as to give notice to creditors of the individual members of the firm that they had been put into the partnership as part of the common stock, and were entered on the books of the firm in such way as to comply with the Statute of Frauds, then the partnership creditors might properly be given priority over the separate creditors to the extent of the proceeds of sales of such property. The record does not disclose such facts as would justify us in determining that question, but as the decree must be reversed, the Court below can authorize testimony to be taken on that subject. We have carefully examined the authorities cited by the counsel for the respective parties, as well as many others, and have found considerable apparent conflict between some of them. But when the facts of them are carefully examined, it will be found that the most

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of them are in accord with our conclusion, which might be summarized as follows :

1st. That as the farms, houses and similar property were not purchased with partnership funds, for partnership purposes, but were, as far as the public records show, the separate property of the individual members, and were not incident to the business of the firm, the fact that the partners entered them on the firm books and treated them as firm property is not sufficient to change them into partnership property, and the proceeds of sales of them should be applied to the payment of the claims of individual creditors prior to those of the partnership creditors.

2nd. That if the paper mills, and such other real estate connected therewith as would be necessary for the convenient and proper conduct of the business, were treated by the partners as partnership property, were put into the firm business as part of the common stock, and were so entered in the books of the firm as to comply with the Statute of Frauds, then the partnership creditors should have priority over the general creditors of the individual partners in the distribution of the proceeds of sales of such property ; provided this class of property was so used as to give notice to the latter that it was treated as partnership property and was substantially involved in the business of the firm.

There is still another question to be disposed of. It is contended that the appellant is estopped from claiming that the real estate is individual and not partnership property, by reason of its signing a recommendation to the Court to ratify its sale reported May 1st, 1894, by John B. Ramsay, one of the trustees.

Mr. Ramsay and Mr. Schott, the trustees, differed as to the propriety of a sale of the property remaining unsold at the price which had been offered, the latter thinking that in time a better price could be obtained, whilst the former thought it best to sell at once. Mr. Ramsay reported the sale and Mr. Schott was required to show cause why it

should not be made. The American National Bank, of which Mr. Schott was cashier, was the only creditor opposing the sale, and Mr. Ramsay undertook to secure the concurrence of enough creditors to overcome the opposition of that bank. Accordingly the National Mechanics' Bank, of which Mr. Ramsay was president, and which was the largest creditor, signified, through its attorneys, who were also attorneys for the trustees, its concurrence in the sale to the officers of the appellant, which was the next largest creditor and sought their consent. It was explained to them that by the proposed sale the creditors of William H. Hoffman & Sons would get about  $33\frac{1}{3}$  per cent. of their claims, and it was thought that the concurrence of two such large creditors would influence the others. The appellant fully understood that the  $33\frac{1}{3}$  per cent. was to come from the sale of the property mentioned in these proceedings. The appellant, the Mechanics' Bank, and another creditor, signed a paper requesting the Court to ratify the sale, whereupon Mr. Ramsay sent out a circular letter to the creditors of the firm asking their concurrence in the sale, stating that the proposed sale would pay the creditors about  $33\frac{1}{3}$  per cent. of their claims, and that these two banks approved of it. It is admitted that the officers of the Union Bank asked the counsel for the trustees and Mechanics' Bank whether the signing of the concurrence to the sale would affect the claim of the Union Bank, and "were told that it would not, and that it only meant an assent to said sale at the price proposed. But nothing was said by either side as to the claim against the property as individual or firm property."

We do not think the facts stated in the record are sufficient to estop the appellants. It is perfectly apparent that the difference between the trustees was as to the price to be obtained for the property—whether the offer received by Mr. Ramsay should be accepted or they should wait for a better price. There is not a particle of evidence tending to show that the property did not bring its full value, or that

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any of the creditors have been injured. The only creditor that filed objections to the appellant's claim on this ground is the Mechanics' Bank, which had concurred in the sale before the appellant did. It could not, therefore, claim that it was misled by the act of the appellants. But before the officers of the appellant signed the recommendation, they inquired of the attorneys representing the Mechanics' Bank and the trustees who were seeking their concurrence, whether it would affect the claim of the Union Bank, and were told it would not. There can be no question as to what claim was referred to, as the agreed statement shows that "the claim of the Union Bank was filed long prior to any sale against both the partnership and the endorsers of the notes held by the bank." It would, perhaps, be more equitable to say that the Mechanics' Bank should be estopped from questioning the right of the Union Bank to assert its claim after having induced it to sign the concurrence by the assurance that such act would not affect its claim. But there is no proof that any creditor was either misled or injured by the action of the appellant, and nothing in the record to justify an inference that such was the case.

This Court, in *Hardy & Brothers v. Chesapeake Bank*, 51 Md. 590, in speaking of the doctrine of an estoppel *in pais*, said: "It can therefore only be set up and relied on by a party who has actually been misled to his injury, for if not so misled he can have no ground for the protection that the principle affords." From what we have already said it can be seen that we think that an application of the above principle of law to the facts of this case disposes of the question of estoppel. The decree *pro forma* must be reversed and the cause remanded for further proceeding in accordance with this opinion.

*Decree reversed and cause remanded  
with costs to the appellant.*

(Decided January 31st, 1895.)

**JOHN H. SHORT vs. STATE OF MARYLAND.**

*Constitutional Law—Poll Taxes—Privileges and Immunities of Citizens of the U. S.—Compulsory Labor on Roads.*

A statute imposing compulsory labor upon persons residing in the several election districts of a county for the purpose of keeping the roads in repair, with the privilege of providing a substitute, or the payment of a stipulated sum in lieu of such personal service, is not a levying of taxes by the poll, within the meaning of the Constitution.

Such law is also not in conflict with the Fourteenth Amendment of the Federal Constitution, as abridging the privileges and immunities of citizens of the United State; that provision not being designed to control the power of the State over its own citizens.

The origin and character of the poll taxes prohibited by the Constitution, explained.

Appeal from the Circuit Court for Dorchester County. The appellant was indicted for a violation of the local road law of Dorchester County, in that, after having been duly summoned by the road supervisor, he refused to work on the roads of said county, or to provide a substitute, or to pay the sum of seventy-five cents in lieu thereof. A demurrer to the indictment alleged the invalidity of the said road law, being secs. 268-272 of Art. 10 of the Code of Public Local Laws, because in conflict with the 13th and 14th Amendments of the Constitution of the United States, with Art. 3, secs. 33 and 40 of the Constitution of Maryland, and Art. 15 of the Declaration of Rights. The demurrer being overruled, the case was tried before the Court and the appellant was found guilty and sentenced to pay a fine of seventy-five cents, and to stand committed until the fine and costs were paid. The appellant appealed from the order overruling his demurrer by a petition assigning errors.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

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Argument of Counsel.

*George M. Russum and Sewell T. Milbourne*, for the appellant.

1. Sections 268, 269 and 270 of Art. 10 of the Code of Public Local Laws, title, "Dorchester County," sub-title, "Roads," are null and void, because they violate (a) the 13th and 14th Amendments to the Constitution of the United States, and (b) the 40th section of Art. 3 of the Constitution of this State.

(a.) They are in violation of the 13th and 14th Amendments of the Constitution of the United States, because they impose involuntary servitude upon "all able-bodied male residents" of said county above the age of 20 and under 50, who have resided thirty days "within any road district" of said county, and abridge "the privileges and immunities of citizens of the United States," and deny to such persons "the equal protection of the laws." The work required is *compulsory* and is an infringement of the personal liberty—the liberty of contract—the liberty to dispose of his labor and property as he thinks best for the protection of his welfare and happiness—of every person who may be required to perform it. It is distinctly a personal servitude, to which there is no limit, except the judgment of the supervisor as to what shall be "necessary." 1 *Code Pub. Local Laws*, title "Dorchester County," secs. 268, 269, 270; *In re. Sah Qua*, 31 Fed. Rep. 330; *Slaughter House Cases*, 16 Wallace, 69; *In re. Ah Fong*, 3 Sawyer 157; *Ah Kow v. Nunan*, 5 Sawyer, 562; *Re. Ah Chong*, 6 Sawyer, 565; *In re. Jacobs*, 98 N. Y. 98; *Singer v. The State*, 72 Md. 465; *Tragesser v. Gray*, 73 Md. 259; *Herelfich v. Catonsville Water Co.*, 74 Md. 296; *Henderson v. Mayor of New York*, 92 U. S. (2 Otto), 259; *Yick Wo v. Hopkins*, 118 U. S. 370; *Powell v. Pennsylvania*, 127 U. S. 684; *Kuhn v. Detroit*, 70 Mich. 534.

(b.) They violate the 40th section of the 3d Article of the Constitution of this State, because they authorize "private property"—labor, proper implements, money—to be "taken" for public use without compensation. They authorize the confiscation of the property of the able-bodied

male residents described therein—that is, their labor, and the proper implements and their money for such time, not less than two days, as the supervisor may deem “necessary.” The Legislature has no such power. If it can authorize the property of the citizen to be taken for public use for two days, without compensation, it can deprive him of it altogether. Art. 3, sec. 40, Constitution of Maryland (1867), *Wynehamer v. The People*, 13 N. Y. (3 Kernan) 384; *Bloodgood v. Ml. etc. Co.*, 18 Wend. 18; *Slaughter House cases*, 16 Wall. 69; *Waters v. Wolf*, 29 Atl. Rep. 651.

2. They violate sec. 15 of the Declaration of Rights, because (a) they impose a poll tax, and (b) establish an arbitrary rule of taxation, without regard to the “actual worth in real and personal property” of the person taxed. Besides, while describing the class of persons liable to be taxed, they delegate to the supervisor the authority to select the particular person who shall be compelled to pay it, which is beyond the power of the Legislature. *Daly v. Morgan*, 69 Md. 467; *Appeal Tax Court v. Patterson*, 50 Md. 367; *Tyson v. Balto. Co.*, 28 Md. 527; *Williams' case*, 3 Bland, 255; *Proffit v. Anderson*, Va. 1894.

The Bill of Rights is the essence, the substance, the very *ousia* of the common law, and the common law never ceases to operate through lapse of time or non-user. *Buchanan v. State*, 5 H. & J. 317.

The statute in question also violates sec. 33 of Art. 3 of the Constitution, in that it is special legislation in a case for which provision has already been made by existing general laws, since the County Commissioners have control of the county roads.

*John Prentiss Poe, Attorney-General* (with whom was *P. L. Goldsborough, State's Attorney of Dorchester County*, on the brief), for the appellee.

A road system, one hundred and ninety years old, is now, for the first time, sought to be set aside as unconstitutional, and for reasons, some of which, if applicable at

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all, were applicable as well when it was established as they are now, and yet until now its validity has never been questioned.

The system is by no means peculiar to Maryland, but will be found to have prevailed in other States of the Union. Indeed, it seems to have been a familiar mode of providing for the repairing of public roads, and the right of the States to call upon their people, either to render service themselves for such purpose, or to furnish a substitute, or to pay in money an equivalent for such service, and the corresponding duty of the citizen to respond to such call, seem to have been universally treated as standing upon the same footing as compulsory militia service by persons between certain specified ages, and compulsory jury service, also by persons between specified ages. The system itself seems to be almost as old as the common law. It appears that in 1550 the care of the public roads in England was first left to parishes. In 1555 it was regulated by statute, and this statute has been amended by many subsequent Acts. Sir Wm. Blackstone's statement is that "Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair, unless, by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas*, to which every man's estate was subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood." 1 *Black Com.* 538.

"A levy is sometimes made payable in labor, but this has commonly been restricted to the labor needed to keep the highways in repair; and while it is in its nature a tax, it partakes to some extent of a police regulation. Neither in common speech nor in the customary revenue legislation would a burden of this nature be understood as embraced in the term tax; and statutory provisions for assessment



are not therefore applicable to it unless made so in express terms." *Cooley on Taxation*, page 14. Nor are the constitutional provisions, in regard to taxation, applicable to statutes requiring labor in public roads. See *Dillon on Municipal Corporations*, 676, and 760 to 762; *Elliott on Roads*, 7; *Burroughs on Taxation*, sections 5 and 9; *1st Minor's Inst.*, 2d ed. p. 115. The text of these authors is abundantly sustained by the decisions. *State v. The Commrs. of Halifax*, 4 Dev. 347; *Sawyer v. Alton*, 4 Ill. 130; *Town of Pleasant v. Kost*, 29 Ill. 494; *Cooper v. Ashe*, 76 Ill. 11; *Tipton v. Norman*, 72 Mo. 380; *Johnson v. Macon*, 62 Georgia, 645; *Miller v. Gorman*, 38 Penn. St. 311-12; *Starkesboro v. Town of Henesburg*, 13 Vt. 215; *The Overseers of the Poor of the Town of Amima v. The Overseers of Stanford*, 6 Johns. 92; *M. & C. C. v. Greenmount Cemetery Company*, 7 Md. 531.

*As to the 13th Amendment.* It is not necessary to say much upon this point, for, in view of the decision of the Supreme Court of the United States in the *Slaughter House cases*, 16 Wallace, 69, it would seem to be quite plain that the imposition in question can hardly be termed an "involuntary servitude," within the meaning of that amendment. Indeed, it requires some effort to suppose that the framers of that amendment, and the Legislatures of the several States which adopted it, prohibiting slavery and involuntary servitude, except for crime, designed thereby to wage relentless war upon and destroy the time-honored road system of Dorchester County, under which males between the years of twenty and fifty, in the several road districts of that county, might be called on for the local improvement of their respective districts, to work three days in the year themselves, or by acceptable substitutes, or to pay the oppressive amount of seventy-five cents per day.

*As to the 14th Amendment.* It is likewise difficult to perceive how this local road system is in conflict with the 14th Amendment. We do not know of any "privileges or immunities of citizens of the United States" which it

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"abridges," nor are we aware of any laws, "the equal protection" of which it "denies" to the appellant. The decision of the Supreme Court in the Slaughter House cases, seems also effectually to dispose of this ground of objection.

The local road law of Dorchester County does not in any sense contemplate or provide for "the taking of private property for public use without just compensation." It has nothing to do with the power of eminent domain, to which alone this section of the Constitution is applicable. It is merely an exercise for purpose of local improvement and benefit of the taxing power or police power, either or both, of the State. The distinction between these powers and the power of eminent domain is very clearly stated in the opinion of Judge Field, in *County of Mobile v. Kimball*, 102 U. S. 703. To the same effect precisely are the decisions of this Court. *Moale v. Mayor, &c.*, 5 Md. 320; *Groff v. Mayor, &c.*, 44 Md. 77.

Nor can the burden in question justly be treated as a poll tax within the meaning of the Bill of Rights. *Williams' case*, 3 Bland, 254; *Steele v. C. & P. R. R. Co.*, 40 Md. 51; *Wells v. Hyattsville*, 77 Md. 141; *McMahon's History of Maryland*, 397-401.

ROBINSON, C. J., delivered the opinion of the Court.

By the Public Local Laws for Dorchester County all able-bodied residents of the county above twenty and under fifty years of age are compelled to labor two days at least in every year in repairing the roads of said county, with the privilege, however, of furnishing a substitute, or paying to the road supervisors seventy-five cents for each day such person may be summoned to labor, the money thus paid to be expended in repairing the roads.

And it further provides that any one neglecting or refusing to perform such labor, or to provide a substitute, or to pay seventy-five cents per day for each and every day he may be summoned to work, shall be guilty of a misdemeanor, and upon trial and conviction before a Justice of the

Peace, shall be fined seventy-five cents for each day's delinquency and costs, and shall stand committed until the fine and costs are paid. Sections 268, 269 and 270, Local Laws Dorchester County. And the Act further provides, that any one aggrieved by the judgment of the Justice of the Peace may appeal to the Circuit Court.

The main question, and the only one, it seems to us, about which there can be any real contention, is whether this local law is in conflict with the Constitution, which declares, "that the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited. Art. 15, Declaration of Rights, Constitution of 1867. And in construing the meaning of this Article, we must bear in mind that the same declaration is to be found in the Constitution of 1776, and in every Constitution adopted in this State down to the Constitution of 1867. So the question comes to this: Is compulsory labor imposed upon persons residing in the several election districts of a county for the purpose of keeping the roads in repair, with the privilege of providing a substitute, or the payment of a stipulated sum in lieu of such personal service, a "*levying of taxes by the poll*," within the meaning of the Constitution?

Such compulsory labor is beyond question a burden on the persons upon whom it is imposed; and though it assumes the form of labor, it may be fairly considered, we agree, in the nature of a tax. At the same time, when this article in the Bill of Rights is construed in the light of the legislation in regard to levying taxes by the poll in force when the Constitution of 1776 was adopted; and in the light of the legislation in regard to compulsory labor on the public roads, also in force at that time, and which has continued in force down to the present, it is clear, we think, that compulsory labor for the purpose of keeping the roads in repair has never been considered as a poll tax, prohibited by the Constitution. A brief reference to the legislation in force when the Constitution of 1776 was adopted will clearly show, we think, the nature

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and character of poll taxes, the levying of which was declared to be grievous and oppressive, and ought to be *abolished*. If we turn to the Act of 1715, chapter 15, we find that all persons, males and females, free and slave, above the age of sixteen years, are declared to be "*taxables*," and upon each person thus declared to be a taxable, the commissioners of the several County Courts were directed to levy a specific sum, to be paid in money or tobacco, for the support of the Government. And this Act, providing for the levying of taxes by the poll, continued in force down to the Revolution.

And in addition to the poll taxes thus levied for public purposes, the Act of 1702, chap. 1, declaring the Church of England to be the established church of the colony, also provided that a tax of forty pounds of tobacco *per poll* should be levied each and every year, for the support of the clergy, and this Act continued in force down to the Revolution. And strange as it may seem nowadays, the poll taxes, to which we have referred, were the only *direct taxes* levied for public purposes during the colonial period. Such taxes thus levied, without reference to the ability or the means of the "taxable" to pay them, must necessarily have been, in many cases, burdensome and oppressive, and it was such levying of taxes by the poll that the Constitution of 1776 denounced as being "*grievous and oppressive*," and which ought to be "*abolished*."

And whilst poll taxes were levied for public purposes, the public roads were made and kept in repair by compulsory road labor, and with this article in the Constitution of 1776, prohibiting poll taxes, statutes compelling persons to labor on the roads for the purpose of keeping them in repair, have been in force down to the present time, and this is the first time the constitutionality of such laws has been questioned.

As early as the Act of 1704, chapter 21, all laborers and servants were required to work on the public roads, and upon the refusal of such laborers to perform the services

thus required, or the master to furnish his servants, the master and laborers were liable to indictment and punishment. This law was substantially in force when the Constitution of 1776 was adopted, and continued in force for years after its adoption. And instead of being repealed, or being considered as repugnant to the article in the Bill of Rights of 1776, the Act of 1795, chap. 37, recites "that whereas doubts have arisen what description of persons are intended to work on the public roads under the existing laws, to which this is a supplement; therefore, Be it enacted, that every able-bodied male person shall be and is hereby made subject to like personal service." And this Act further provided for the payment of money in commutation of such personal service. And though this Act has been amended from time to time, and most of the counties have been exempted from its operation, the main features of the Act, the compulsory service, with the privilege of furnishing a substitute or paying a stipulated sum in lieu thereof, have been part of the local law of Dorchester, Somerset and other counties, down to the present time. In construing this Article in the Bill of Rights of the Constitution of 1867, being identical with the Article in the Constitution of 1776, it is but fair to presume that the framers of the Constitution of 1867, and the people who adopted it, understood this limitation on the power to levy taxes by the poll in the sense in which it had been construed and acquiesced in for nearly one hundred years.

Similar statutes in other States have been in operation for years, and their validity, when questioned, has been fully sustained. And referring to these statutes, Judge Cooley says: "Though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation, and the general terms "tax" or "taxation," as employed in the State Constitutions, would not generally be understood to include it." *Cooley on Constitutional Limitations*, (6th ed.) 629; *Cooley on Taxation*, 14.

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Opinion of the Court.

And then as to the objection that this local law is repugnant to that clause in the Fourteenth Amendment of the Federal Constitution, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it is sufficient to say that the interpretation of that clause by the Supreme Court in the *Slaughter House cases*, 16 Wallace, 36, is a complete answer to this objection. There is a distinction, says Mr. Justice Miller, between citizenship of the United States and citizenship of a State. To become a citizen of the United States it is only necessary that one should be born or naturalized in the United States; but to be a citizen of a State he must reside within the State. Further, he says, "It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it." And the Supreme Court held that this clause merely protected "*the privileges and immunities*" of citizens of the United States, and was not intended to control the power of the State governments over the rights of its own citizens. And as to the privileges and immunities belonging to the citizens of a State, "*the latter must rest for their security and protection where they have heretofore rested*," that is with the State in which the citizen resides. And again, in *Bradwell v. The State*, 16 Wallace, 130, referring to the same clause in the Fourteenth Amendment, Mr. Justice Miller, speaking for the Court, says: "The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of."

The appellant is a citizen of this State, and the law of which he complains as having abridged and interfered with his "privileges and immunities," is a law of his own State; and this being so, the clause in the Fourteenth Amendment, on which he relies, has no application. The law of which

he complains merely imposes on him the same duty and obligation which it requires of all other persons within the ages designated by the statute, without making any distinction whatever on account of color or race. And there is no ground on which it can be assailed as being repugnant to any of the provisions of the State or Federal Constitution. For a breach of the duty imposed on the appellant and all others, it provides for a fair and impartial trial, according to the law of the land, and upon conviction it provides that the offender shall be fined and stand committed until fine and costs are paid. No one can question the power of the State thus to provide for the enforcement of its law and the punishment of all who violate it. As to the policy and wisdom of the law in question, it is quite sufficient to say that is a matter resting with the Legislature and not with the Courts. *Cooley on Taxation*, 437; *Appleton v. Gray*, 5 Gray, 520.

*Rulings affirmed.*

(Decided February 27th, 1895.)

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LOUIS W. GUNBY vs. LEVIN A. PORTER, GARNISHEE  
OF WILLIAM F. CAUSEY.

*Attachment Against Non-Resident—Sufficiency of Affidavit.*

In an attachment against a non-resident, an affidavit by the plaintiff that the defendant "is not a citizen of the State of Maryland and doth not reside therein," is a substantial compliance with Code, Art. 9, sec. 4, requiring the affidavit in such case to state that the plaintiff "knows, or is credibly informed and verily believes, that the defendant is not a citizen of the State, and that he doth not reside therein."

Appeal from the Circuit Court for Wicomico County.  
The case is stated in the opinion of the Court.

Md.]

Opinion of the Court.

The cause was argued before ROBINSON, C. J., MC-SHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

*Robert P. Graham* (with whom was *H. L. D. Stanford* on the brief), for the appellant, cited: *Franklin v. Claflin*, 49 Md. 24; *Foran v. Johnson*, 58 Md. 145; *DeBebian v. Gola*, 64 Md. 261; *Risewick v. Davis*, 19 Md. 92; *Barr v. Perry*, 3 Gill, 313; *Jones v. Leake*, 11 Sm. & Mar. 591; *Drake on Att.*, sec. 106.

*E. Stanley Toadvin* (with whom was *Geo. W. Bell* on the brief), for the appellee, cited: *Shriver v. Wilson*, 5 H. & J. 132; *Evesson v. Selby*, 32 Md. 345; *Boarman v. Israel*, 1 Gill, 381; *Risewick v. Davis*, 19 Md. 91; 2 *Poe's Prac.*, 502; *Randall v. Mellen*, 67 Md. 187; *Coward v. Dillinger*, 56 Md. 61; *DeBebian v. Gola*, 64 Md. 269; *Franklin v. Claflin*, 49 Md. 38; *Drake on Att.*, sec. 84; *Hall v. Jackson*, 48 Md. 254; *Barr v. Perry*, 3 Gill, 317; *Hinkley on Att.*, sec. 49; *Dumay v. Sauchez*, 71 Md. 510; *Thompson v. Tomson*, 1 H. & McH. 504; *Ruppert v. Hang*, 87 N. Y. 141; *Thornington v. Merrick*, 101 N. Y. 5; *Dean v. Oppenheimer*, 25 Md. 377.

BRISCOE, J., delivered the opinion of the Court.

The appellant sued out an attachment in the Circuit Court of Wicomico County against the defendant, William F. Causey, a non-resident of the State of Maryland, and attached certain goods in the hands of the appellee as garnishee. The garnishee was summoned, and at the trial moved to quash the attachment, because of the insufficiency of the affidavit. There were other reasons assigned in support of the motion to quash, but it is not material that they should be considered here. The motion was sustained, and from the judgment entered in the case this appeal has been taken.

It is contended that the affidavit is defective, because it does not sufficiently aver the jurisdictional fact of the non-residence of the defendant. In the affidavit whereon



the attachment was issued, the plaintiff avers that the defendant, not being a citizen of the State of Maryland, and not residing therein, is justly and *bona fide* indebted —, and the Clerk of the Court, before whom the affidavit was made, certifies that the plaintiff made oath that the defendant is not a citizen of the State of Maryland, and doth not reside therein.

And it is urged that this affidavit is defective, because it fails to set forth the precise words of the statute, that the plaintiff “knows, or is credibly informed and verily believes that the defendant is not a citizen of the State, and that he doth not reside therein.” Code, Art. 9, sec. 4.

Now there can be no doubt that proceedings under our attachment laws against the property of an absent debtor is a special remedy conferred by statute, and must be followed in the manner pointed out by the statute, but a substantial compliance is all that is held to be necessary. One of the jurisdictional facts necessary to appear in the affidavit as the foundation of the attachment, is the non-residence of the defendant. In this case we have the positive and affirmative oath by the plaintiff, that the defendant is a non-resident, which we think not only substantially complies with the statute, but is sufficient to support the attachment. Any additional statement where the truth of the fact averred is not traversed nor denied, could add nothing to its validity.

In the case of *Franklin, Claimant, v. Clafin & Co.*, 49 Md. 37, this Court said: “We think it is clear that the jurisdictional fact need only be set forth with substantial accuracy without negating every possible conclusion to the contrary.” And in *Jones v. Lake*, 11 Smedes and Marshall Reports, 593, a case somewhat similar to the one now under discussion, where a writ of attachment was quashed in the Circuit Court, because the affidavit whereon it was issued did not set forth in so many words, that the facts sworn to were within the personal knowledge of the affiant, or that he had been informed or believed them to be true,

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Opinion of the Court.

was reversed on appeal by the Court of Appeals of Mississippi, and Mr. Justice Thatcher, in delivering the opinion of that Court, said: "That the statute, it is true, says that the facts, upon which an application for an attachment is predicated, shall be stated in the affidavit to be within the personal knowledge of the applicant, or that he is informed or believes the facts stated to be true. The addition of such a statement, after a positive affidavit that certain facts exist, would be mere surplusage, which the law never tolerates. The substantial requirements of the Act are complied with in this affidavit, which is enough to sustain its validity."

And to the same effect are the decisions in cases where the legal sufficiency of affidavits in attachment cases have been passed upon by this Court. *Franklin v. Claflin*, *supra*; *Foran v. Johnson*, 58 Md. 144; *DeBebian et al. v. Gola*, 64 Md. 264; *Dumay v. Sanches & Gibson*, 71 Md. 509.

We therefore think that the affidavit in this case was sufficient to support the attachment, and there was error in quashing the writ, so the judgment will be reversed and a new trial awarded.

*Judgment reversed and new trial awarded.*

(Decided February 27th, 1895.)

JOHN OSCAR FREENY vs. KATHERINE JACKSON  
FREENY.

*Divorce a Mensa—Cruelty of Treatment—Competency of Children to Testify—Filing of Exceptions to Evidence in Equity Causes.*

On a bill for a divorce *a mensa* by a wife against her husband on the ground of cruelty of treatment, proof that the defendant had frequently used personal violence towards the plaintiff, and threatened her with great bodily harm, and had done acts injurious to the plaintiff's health, entitles her to the relief asked for.

Whether children of tender years are competent witnesses, is a matter within the discretion of the trial Court.

When evidence is taken before an Examiner in Equity, and a party objects to certain testimony, the Examiner should be directed to note the objection without setting forth the ground of it, except when a question is objected to as leading. But after the evidence is returned, written exceptions to the testimony, indicating the evidence excepted to, the grounds of the objections, and the names of the witnesses, should be filed in the cause before the hearing. It is not sufficient to except generally to "all the testimony objected to and noted by the Examiner."

Appeal from the Circuit Court for Wicomico County. The bill of complaint in this cause charged that the defendant had for some years treated his wife, the plaintiff, with great cruelty, harshness and brutality, at times striking, kicking and beating her, and that on account of his intolerable conduct she was obliged to leave his house and seek shelter elsewhere. The bill prayed for a divorce *a mensa et thoro*, alimony, and the the custody of three infant children. Objection having been made to the competency of these children, aged about six, nine and eleven years, respectively, to testify, the Court below, after examining them orally, held that they were competent witnesses, and ordered that the plaintiff should have leave to take their testimony before the Examiner.

Md.]

Statement of the Case.

The trial Court held that the evidence established that during his married life the defendant had conducted himself in a harsh and violent manner towards his wife ; " that instead of providing efficient nursing and attendance for her when sick, he has compelled her to do the entire work of the household, without the help of any servant, and when not sick, he has required her to work beyond her strength ; that he has used harsh, abusive and violent language towards her, threatening to do her great bodily harm, and even to kill her ; that he has assaulted her with blows from his hands and from his fists ; that he has pushed her, pinched her, and kicked her ; that although the defendant is a man of considerable property, he has failed, during much of his married life, to provide properly for the comforts of his family, and that by his threats and his violence he has put her in fear for her safety, and thus has driven her to separate from him."

The decree of the Court below (PAGE, C. J., HOLLAND and LLOYD, JJ.), divorced the plaintiff *a mensa et thoro* from the defendant, awarded to her the custody of the infant children of the parties, and ordered the defendant to pay to the plaintiff an annual allowance of \$400 ; and from this decree the defendant appealed.

The cause was argued before ROBINSON, C. J., MCSHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

*E. Stanley Toadvin* and *Walter S. Humphreys*, for the appellant.

*Robert P. Graham* and *H. L. D. Stanford*, for the appellee.

FOWLER, J., delivered the opinion of the Court.

The bill in this case was filed for a divorce *a mensa*. The ground alleged is cruelty of treatment. The questions presented, with the exception of a few minor ones in regard to exceptions to testimony, involve issues of fact, and may be

briefly disposed of. We entirely agree with the conclusions announced by the learned Judges below. The case was heard before a full bench, and the carefully prepared and exhaustive opinion, which was concurred in by all the Judges, after reviewing all the testimony, grants to the wife the relief she prays for in her bill.

This conclusion is in our opinion entirely in accordance with the decided weight of the testimony. It would serve no good purpose to discuss in detail the testimony which discloses the unhappy relations which existed between the plaintiff and defendant, nor would it be either instructive or interesting to show that the charges of cruel treatment on which the wife bases her claim to relief, have been fully and satisfactorily established. In cases like this the witnesses relied on must necessarily come from the domestic circle. Ill-usage of the kind imputed to the husband in this case is not generally indulged in while others are present. In the case of *Hawkins v. Hawkins*, 65 Md. 107, and in other cases, it has been remarked that it is from necessity that members of the family or servants must in most cases like this be called as witnesses. For, say the Court in that case, "ill-usage and cruel treatment of the wife do not generally occur in public places, or in the open face of day."

It appears that the parties to this cause were married in 1880, and that after living together for thirteen years, the plaintiff left her husband, taking with her the three children of the marriage, who were respectively about ten, twelve and seven years of age. The testimony of the plaintiff and these three children, leaving out of consideration all other testimony offered by her, if it is to be received and credited, is amply sufficient to have justified the lower Court in passing a decree of separation. But the testimony of the children is excepted to by the defendant on the ground that they are incompetent to testify by reason of their tender years. After carefully examining the children in regard to their capacity to testify as witnesses in the cause, the Judges below found them to be fully capable, and therefore compe-

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Opinion of the Court.

tent, and gave the plaintiff leave to examine them. If this question were properly before us, we would say, from an examination of the evidence, that we entirely approve of the course adopted by the Court below. But it is clear it was within the discretion of the trial Court. 1 *Greenleaf on Evidence*, sec. 367; *State v. Juneau*, 88 Wis. 180; 59 N. W. Rep. 580. And the ruling thereon is not therefore the subject of appeal.

A large number of other exceptions to testimony were taken below, but as they were not noticed either in the brief or oral argument of defendant's counsel, we think it unnecessary to discuss them, except to emphasize what was said by the trial Judges in regard to the irregular manner in which most of the exceptions were presented in this case.

If it is desired to except to testimony taken before an Examiner, to be used at the hearing of a cause in a Court of Equity, it is sufficient to have the Examiner note the objection (Code, Art. 16, sec. 222), without setting forth the ground on which such objection or exception is based, unless when a question is objected to, because it is leading, in which case the ground of the objection should be stated by the attorney making the objection and recorded by the Examiner, in order that an opportunity may be afforded for changing the form of the question. Under Rule 43, General Equity Rules, adopted by this Court (see sec. 223, Art. 16 of the Code), evidence taken and returned by an Examiner shall remain in Court ten days, subject to exception, before the cause shall be taken up for hearing, unless by agreement of the parties such time be waived. Ample time, therefore, is afforded for the preparation of exceptions, if counsel wish to avail themselves of it. Every exception to testimony must be reduced to writing and filed in the cause, at least before the hearing begins. It will not do, as was done in this case, to except generally to "all the testimony objected to and noted by the Examiner." Every exception should clearly indicate the testimony excepted to, the ground on which the exception is based, and the name or names of

the witnesses whose testimony is excepted should be set forth.

*Decree affirmed with costs to appellee.*

(Decided Feb. 27th, 1895.)

## E. J. WHITMAN *vs.* THE STATE OF MARYLAND.

*Judicial Notice of an Election—Constitutional Law—Title of Statute.*

The Court cannot take judicial notice of the result of a local option election directed to be held by an Act of Assembly, and upon the result of which the efficacy of the Act is made to depend.

Where the title of an Act states that its object is to regulate the liquor traffic in a certain town, and the Act itself provides for the total abolition of the liquor traffic within a larger territory, including the town, upon a certain contingency, such Act is in violation of the Constitution, Art. 3, sec. 29, which provides that the subject of every law shall be described in its title.

The title of the Act of 1894, ch. 484, is "An Act to provide for an election to be held in the town of Cambridge, Dorchester County, to regulate the liquor traffic therein; and repealing sections 207 to 213, inclusive, of Article 10 of the Code of Public Local Laws, title, 'Dorchester County,' sub-title, 'Liquors and Intoxicating Drinks,' so far as the same may relate to or affect said town of Cambridge; and repealing and re-enacting, with amendments, section 218 of said Article." Under the existing law the sale of liquor within certain districts of the county was prohibited, except by druggists upon *bona fide* written prescriptions. The Act of 1894 provided for holding an election on a designated day in the town of Cambridge, and if the majority of votes were for the sale, then it was made lawful for all persons to sell liquor in that town, and the former law was repealed *pro tanto*; but if a majority should be against the sale, then the sale of liquor in said town, and in Election District No. 7, including said town, was prohibited even by druggists. There was nothing in the record to show what the result of the election was, but the defendant, a druggist, was indicted for selling liquor in said town. *Held*, that assuming that the result of the election was a majority against the sale, then that part of the Act of 1894, prohibiting the sale of liquor by druggists upon *bona fide* prescriptions, was invalid,

Md.]

Argument of Counsel.

because in violation of Art. 3, sec. 29 of the Constitution, since the title of the Act relates to the regulation of the liquor traffic in the town of Cambridge, and does not disclose a purpose totally to abolish the same within a larger territory, including the said town.

Appeal from the Circuit Court for Dorchester County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., MC-SHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

*Alonzo L. Miles* for the appellant.

To prohibit the sale of liquor is to prohibit the liquor traffic, and an Act, the title of which is to regulate the liquor traffic, cannot prohibit it. On the contrary, to be regulated, the trade must subsist. *Cooley's Constitutional Limitations*, p. 179, note, and p. 247, note; *City of Emporia v. Volmer*, 12 Kansas, 630; *Miller v. Jones*, 80 Ala. 89; *Town of Cantril v. Sainer*, 59 Iowa, 26; *In re. Hanck*, 38 N. W. Rep. (Mich.) 269, 274, 275; *People v. Gadway*, 61 Mich. 285; 6 *Richardson's Reports* (South Carolina), *Heise v. Council*; *Brownson v. Oberlin*, 41 Ohio State Rep. 478; *Sweet v. Wabash*, 41 Ind. 7; 13 Oregon, 17; *State v. Mott*, 61 Md. 297.

Nor is the difficulty obviated by the mere mention of the words, liquor and intoxicating drinks, in that part of the title which is to *repeal* sections 207 to 213, inclusive, of Article 10 of the Code of Public Local Laws of Dorchester County, sub-title, "Liquors and Intoxicating Drinks," it having been expressly decided in this State that affirmative legislation cannot be enacted under a title to repeal a former statute. *Steifel v. The Maryland Institution for the Instruction of the Blind*, 61 Md. 144; *People v. Mellen*, 32 Ill. 181.

Again, said Act of 1894, ch. 484, is repugnant to the constitutional maxim which forbids the delegation of legislative power. Instead of passing a law, perfect and complete in itself, to take effect upon the contingency of the popular vote of the locality to be affected thereby, the Gen-



eral Assembly embodied in one Act two laws, one *regulating* the sale of intoxicating liquor in the town of Cambridge, the other *prohibiting* the sale of liquor in said town and in *District No. 7*, of Dorchester County, only one of which is described in the title, and made their operation depend upon the vote of persons residing within the corporate limits of the town of Cambridge, which only comprise a portion of the territory and inhabitants of *District No. 7*. *Bradshaw v. Lankford*, 73 Md. 428; *Fell v. State*, 43 Md. 71; *Hammond v. Haines*, 25 Md. 562.

*John Prentiss Poe*, Attorney-General, and *P. L. Goldsborough*, State's Attorney of Dorchester County, for the appellee.

McSHERRY, J., delivered the opinion of the Court.

The appellant was indicted by the grand jury of Dorchester County for unlawfully selling intoxicating liquor to one Stack. The traverser demurred to the indictment, but the demurrer was overruled, and he then pleaded, first, that he did sell the liquor as charged, but that at the time of so doing he was a regular pharmacist or druggist, having a license to carry on the business of pharmacist or druggist; that the sale referred to in the indictment was made upon the written *bona fide* prescription of a regular practising physician, and that he did not sell but once upon the same prescription. He also pleaded not guilty. To the first plea the State, by its attorney, demurred, and the Court sustained the demurrer. The trial then proceeded upon the issue joined on the second plea, and the traverser, having been convicted, was sentenced to pay a fine and to be imprisoned in the House of Correction. A petition was then filed asking that the record be transmitted to this Court as upon writ of error, for a review of the several errors assigned in the petition.

We need not pause to discuss the demurrer to the indictment, because the chief question involved arises on the

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Opinion of the Court.

State's demurrer to the first plea of the traverser. To understand that question, a brief reference must be made to some of the local legislation relating to liquors and intoxicating drinks in Dorchester County.

By the Local Code, Art. 10, sec. 207, to and including sec. 219, the subject of liquors and intoxicating drinks is dealt with. The sale of spirituous, fermented or other intoxicating liquors was prohibited in twelve of the fourteen election districts of the county, but a proviso excepted from this prohibition regular pharmacists or druggists, who were expressly permitted, upon the written *bona fide* prescription of a practising physician, to compound and sell such liquors. These twelve districts included district number seven, which embraced within its limits the town of Cambridge. Sec. 217 contains provisions for submitting to the voters of any election district of the county the question as to whether liquor shall be sold in that district; but no such question can be voted on until a petition has been presented to one of the Judges of the Circuit Court and an order has been passed by him directing the election to be held. Sec. 218 prescribes how an election so ordered shall be conducted, and declares that if a majority of the votes are cast "for license," the provisions of sec. 213 shall apply, and that section fixes a penalty for the sale of liquor by any one; whereas, if a majority of the votes cast are "against license," the provisions of secs. 207 to 215, inclusive, shall apply, and these sections, as already stated, prohibit the sale of liquor except by druggists upon the prescription of a physician.

The local legislation standing thus, the General Assembly passed an Act, being chapter 484 of the Acts of 1894, whose title will be considered later on. It was the obvious design and purpose of this Act to re-submit to the people of Cambridge the question as to whether liquor should be sold in that town. Accordingly minute and appropriate provisions were inserted in the Act for the holding of an election on a designated day in the month of May, 1894,

for ascertaining the sense of the voters of the town with reference to the granting of licenses for the sale of liquor in Cambridge. It was declared by the third section of this Act, that if a majority of the ballots cast should have printed or written on them the words "for the sale of spirituous or fermented liquors," the commissioners of the town should make proclamation of the result, and that on and after the second day of July following it should be lawful for all persons to sell liquor within the limits of the town upon procuring the licenses and complying with the other requirements set forth in subsequent sections of the Statute; and that thereupon secs. 207 to 213 inclusive of the Local Code prohibiting the sale of liquor should be repealed so far forth as the town of Cambridge was affected thereby. By the 10th sec. of the Act of 1894, it was provided that if the election should result *against* the sale of spirituous or fermented liquors, proclamation should be made, and thereupon the town of Cambridge should remain under the provisions of the then existing liquor laws, *except* that it should thenceforth be unlawful for a pharmacist or druggist to sell in said town or in district number seven of the county any intoxicating liquors or medicated bitters producing intoxication, or any compound of which alcohol forms the chief or principal ingredient; and it further provided, that "all laws inconsistent with this provision are hereby repealed, and any pharmacist or druggist violating this provision shall be liable, upon prosecution and conviction, to the penalties provided in section seven of this Act."

There is nothing in the record to indicate that this Act of 1894 was either voted on by the people of Cambridge, or whether the majority of the votes cast were for or against the sale of liquor. The Act, by its explicit terms, was only to become operative if the majority of the votes cast at the election directed to be held in May, 1894, were found to be in favor of the granting of liquor licenses. If that condition precedent did not occur, the Act has no vitality. The repeal of the antecedent local option legislation, as embodied

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in secs. 207 to 213 of the Local Code, was dependent on the Act of 1894 becoming effective, and the latter could only become effective if a majority of the votes cast at the election in May were in favor of license. As the record does not inform us what was the result of the election, if one was ever held, we cannot determine whether the Act of 1894 became operative or not. There are many things of which Courts will take judicial notice. 1 *Green Ev.* secs. 5, 6, 7. Ordinarily, whilst they will take such notice of the geographical divisions of the State, and of the location of the cities and towns thereof, they will not, in a criminal prosecution, supply by that means an omission to prove the *venue*. *State v. Hartwell*, 75 Mo. 251; *State v. Burgess*, 75 Mo. 541. And whilst, too, Courts will take judicial notice of general elections, and of the offices to be filled, they will not take judicial notice of the result of a local option election, *Geider v. Tally*, 77 Ala. 422, nor of the votes of municipal corporations. 1 *Dillon Mun. Corp.* sec. 50. Whilst we are bound to take notice of the provisions of the Act of 1894, because it is a public law, *Higgins v. The State*, 64 Md. 421, still, we cannot take judicial notice of the result of the election directed to be held, and upon the result of which the efficacy of the Act was made to depend.

If, however, it be assumed, in the absence of anything to show the contrary, that the Act of 1894 failed to become operative, so as to authorize the granting of licenses, then it follows, first, that the conditional repeal of the antecedent local option law, as embodied in secs. 207 to 213 of the Local Code, never developed into an actual repeal, and that the old law still remains in force precisely as it stood prior to the passage of the Act of 1894, unless the provision we have cited from the 10th sec. of the latter Act has enlarged and extended the prohibitory features of the Local Code by excluding and abolishing the right which druggists possessed thereunder to sell liquor upon the prescription of a practising physician. That the tenth section attempts to do

this, is obvious, but whether it has validly done so is the question which the traverser's first plea distinctly presents, because that plea relies upon the *proviso* in sec. 207, expressly exempting druggists from the prohibitory terms of the same section. This brings us to the inquiry whether the title of the Act of 1894 is sufficiently descriptive of the subject of section ten to gratify the requirements of sec. 29 of Art. 3 of the State Constitution. The title is in these words: "An Act to provide for an election to be held in the town of Cambridge, Dorchester County, to regulate the liquor traffic therein, and repealing sections 207 to 213, inclusive, of Article 10 of the Code of Public Local Laws, title, 'Dorchester County,' sub-title, 'Liquors and Intoxicating Drinks,' so far as the same may relate to or affect said town of Cambridge, and repealing and re-enacting, with amendments, section 218 of said Article."

The election which this Act made provision for was distinctly stated in the title to be one to *regulate*, and not one to *abolish* the liquor traffic in the *town* of Cambridge, and, so far as the title disclosed, was to have no relation to election district number seven, of which Cambridge forms but a part. Any provision which was necessary or appropriate to carry into effective operation a scheme embodied in an Act whose title declared that it was an Act to *regulate* the liquor traffic in that town could have been constitutionally included under that title. But the total *abolition* of the liquor traffic is in no sense a regulation of it. The repeal of secs. 207 to 213 was declared by the title to be a repeal only in so far as those sections related to or affected the *town*; and the single intimation of an intention to re-enact anything, had reference exclusively to sec. 218. Now, it will be observed, that *sec. 10 of the Act of 1894* does not stop with a declaration, which would have been unobjectionable, that if the majority of the votes cast are against the sale of liquors, then the town of Cambridge should remain subject to the local option law as it stood at that time; but it proceeds with broader, affirmative legislation, not even hinted at,

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much less described, in the title, and prohibits, in the most unqualified terms, the sale of liquors by druggists, *not only in the town of Cambridge*, but also in the *entire seventh election district*, a very much larger territory than the town. Besides this, it repeals absolutely, by a general sweep, not alluded to at all in the title, all laws authorizing such sales by druggists in that whole election district. A power to *regulate* is not a power to *abolish* or *destroy* a trade. *State v. Mott*, 61 Md. 308; 1 *Dillon Mun. Corp.*, sec. 325; *Radecke's case*, 49 Md. 217. A power to regulate the liquor traffic in a town is not a power to abolish that traffic in a much larger territory which happens to embrace that town within its limits; and a repeal of designated sections of a law, only in so far as they relate to a town, is widely different from their repeal in so far as they affect a larger and another locality.

It is clear, then, we think, that not only does this tenth section of the Act of 1894 contain legislation which is not described in the title of the Act, but beyond that it enacts provisions which are foreign and palpably repugnant to the subject which the title discloses. There is not the faintest suggestion in the title to indicate that the body of the Act contained, under any contingency, a single provision prohibiting, in the town of Cambridge, the sale of liquor by druggists or the compounding by them of prescriptions whose chief ingredient is alcohol; and much less is there the most remote intimation in the title that such a prohibitory clause, applying to a whole election district beyond the limits of the town, was contained in the body of an Act whose title professed that the Act was one to *regulate* the sale of liquor merely *within* the town. This tenth section is, therefore, not germane to the subject described in that part of the title which we have been considering; but, on the contrary, it is distinctly foreign to that subject, and must fall unless rescued by the last clause of the title. But this last clause, viz., "and repealing and re-enacting with amendments section 218 of said article," does not remedy the

defect. As we have previously stated, sec. 218 contained provisions prescribing the mode for holding elections, upon the petition of a certain number of citizens and by an order of a Judge of the Circuit Court, to determine whether local option shall prevail; and the amended section, 218, provides the mode for holding, under the same conditions, other elections in districts other than the town of Cambridge for the purpose of determining by a vote of the people whether licenses should be issued in such districts, and contains no word or phrase referring to sec. 10 of the Act of 1894, or to any of its provisions as amendatory of sec. 218. In fact, this amended sec. 218 has relation exclusively to the results of elections to be held under the authority of sec. 217, and not to the result of the election to be held under the Act of 1894 in the town of Cambridge.

As a consequence of these views, we hold that sec. 10 of the Act of 1894, whatever may have been the result of the election held under the Act, is invalid, because repugnant to sec. 29 of Art. 3 of the Constitution.

But there is another aspect of this case, which requires a reversal of the judgment entered by the Court below. It will be observed that sec. 10 of the Act of 1894 was only to become effective in the event that a majority of the votes cast at the election, provided to be held in May, 1894, should be *against* the sale of liquor. Consequently, even if it could be assumed that the section is free from constitutional objections, it, by its express terms, only became operative if a majority of the votes cast were against the sale of liquor. As we have said, there is no evidence and no averment in the record to show either that the election was held, or what its result was, if held. We have stated that we could not take judicial notice of the result of that election, and as there is nothing before us to show affirmatively that sec. 10 ever became operative by reason of a majority of the votes cast being *against* the sale of liquor, the provisions of sec. 207 of the Local Code expressly allowing druggists to sell liquor, must be treated as still in

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force. The State's demurrer to the traverser's first plea admitted the facts which brought the appellant within the scope of sec. 207, and the judgment of the Court below sustaining the demurrer was, therefore, erroneous.

For the error we have indicated the judgment must be reversed.

*Judgment reversed with costs.*

(Decided February 27th, 1895.)

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THOMAS R. BLACKFORD, REGISTER, ETC., AND GEO.  
B. OSWALD, CLERK, ETC., *vs.* WILLIAM H. ROBINSON.

*Time of Registering Voters.*

Officers of registration for the counties are authorized, under the Act of 1892, ch. 573, to register voters who make application when such officers sit for the revision of the registry list in October.

Appeal from an order of the Circuit Court for Washington County (STAKE, J.), directing the appellants to enter the name of the appellee as a qualified voter in the registries of voters of the First Election District of said county. The petition of the appellee set forth that in the month of October, 1894, he applied to the appellant, Blackford, to be registered as a voter; that his application was refused, and he prayed for the passage of the above order.

The cause was submitted on the brief of *Chas. A. Little*, for the appellant.

ROBINSON, C. J., delivered the opinion of the Court.

The question in this appeal is a plain and simple one. The registration officers for several counties are required to sit



three successive days in September of each year, beginning on the third Monday of said month, and four successive days in October of each year, beginning on the first Monday of October, for the registration of voters. Act 1892, chap. 573, sec. 9. And it further provides that they shall also sit on the Monday next succeeding the second Monday in October for revision and for the reinstatement of persons whose names shall have been stricken off. And section 14 further provides that the officers of registration, when sitting at any time thus provided for the registration of voters or *for the revision* of their registries of voters, shall register all persons making personal application to such officers of registration to be registered as voters, &c.

And the question is whether the officers of registration for the counties are authorized to register voters, who may make personal application to be registered on the day set apart by the law for the revision of the registry list, that is, on the Monday next succeeding the second Monday in October. This question is answered by the plain language of the 14th sect., which provides, as we have seen, that such officers, when sitting at any time prescribed by the Act, *either for the registration of voters* or the revision of their registries, shall register all persons making personal application to be registered.

The appellee having made personal application to the officer of registration on the day he was sitting for the purpose of the revision of the registry list, he was entitled to be registered as a voter. And this being so, the ruling of the Court will be affirmed.

*Ruling affirmed.*

(Decided February 27th, 1895.)

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Syllabus.

## JULIA SIMPSON AND WM. A. SIMPSON vs. FRANKLIN BAILEY AND OTHERS.

*Sale of Real Estate of Intestate in Orphans' Court.*

A sale of the real estate of an intestate, of less value than \$2,500, made under an order of the Orphans' Court having jurisdiction of the subject-matter and of the parties, cannot be impeached collaterally for mere errors or irregularities in the procedure.

A sale of the real estate of an intestate decedent was made by his administratrix under an order of the Orphans' Court, and the land was subsequently conveyed to the defendants. In an action of ejectment by the heirs at law of the decedent, *Held*, that although the sale should have been made by a trustee, yet the failure to do so was not such an error in procedure as would make the sale by the administratrix absolutely void, or open to collateral attack.

Appeal from the Circuit Court for Charles County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, BRISCOE and BOYD, JJ.

*Marion Duckett* (with whom was *E. Dent* on the brief), for the appellant.

*Adrian Posey* for the appellee.

ROBINSON, C. J., delivered the opinion of the Court.

This is an action of ejectment, and the plaintiffs, in support of their title, proved that Cornelius Bailey died seized of the tract of land set forth in the declaration, and that they were his heirs at law.

The defendants claimed title under a sale made in pursuance of a decree of the Orphans' Court of Charles County for the sale of the real estate of the said Bailey. And to prove title in themselves, the defendants offered in evidence

a petition filed by Elizabeth Bailey, administratrix of the said Cornelius Bailey, for the sale of the real estate of the intestate, under whom the plaintiffs and defendants both claimed title, and the proceedings thereunder, including the decree, and the sale of the real estate and *mesne* conveyances from the purchaser, and upon the objection of the plaintiffs' counsel, the Court decided that the proceedings thus offered were not admissible for the purpose of proving title in the defendants.

And in support of the ruling of the Court, it is insisted that the sale of the real estate of the intestate under these proceedings is *absolutely void*, and the purchaser thereunder acquired no title, because the decree shows that the Orphans' Court appointed Elizabeth Bailey, as administratrix, to sell the real estate, and that the sale was made by her in that capacity, and not as trustee. To such a contention as this we cannot agree. The Orphans' Courts have concurrent jurisdiction with the Circuit Courts to decree the sale of the real estate of intestates in all cases where the value of the real estate does not exceed twenty-five hundred dollars, and to ratify the sales thus made in the same manner as sales made by trustees under the appointment of the Circuit Courts.

And the Code further provides that the Orphans' Courts shall have authority to appoint a trustee to make such sales, which trustee may be the *administrator*, and that upon the ratification of the sale and the payment of the purchase money, the trustee shall convey the title to the purchasers. The Code, it is true, contemplates that when an administrator is appointed trustee, he shall sell the property *as trustee, and not as administrator*, and that he shall give bond as trustee. But a mere error in the description of the person, and the character in which he sells, does not make *the sale itself absolutely void*. There is a broad distinction between an error of this kind in the *procedure* where a Court has jurisdiction of the subject-matter and the parties, and a judgment rendered without jurisdiction. A judgment rendered

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without jurisdiction is void, and binds no one ; but, where the Court has jurisdiction, its judgments cannot be impeached *collaterally* for mere errors or irregularities in the proceeding. For such errors the remedy is by appeal.

In this case the Orphans' Court had jurisdiction to decree the sale of the real estate, and if it had jurisdiction of the parties, its decree cannot be assailed in a collateral proceeding for error in the procedure.

The second objection, namely, that the proceeding was instituted by Elizabeth Bailey, administratrix, in behalf of the creditors, whereas it should have been instituted by the creditors, is equally untenable. A suit, it is true, must be brought by a party having an interest in the subject-matter, and the want of such interest, if apparent on the face of the proceedings, is ground for demurrer ; or, if not apparent, the defendant may take advantage of the defect by way of answer or plea. *Mitford's Equity Pleading*, 154. But if no objection is made by the defendant, and a decree is rendered, the decree itself cannot be impeached collaterally for such defect. In *Downes v. Friel*, 57 Md. 531, where a bill was filed for partition under Article 16, section 99, of the old Code, in the name of Daniel Friel, next friend of Anne E. and Richard A. Downes, minors, it was held that although the Code contemplated that the suit should be brought in the name of one or more of the parties in interest, and if such parties were minors, that it should be brought in their names as complainants, by their next friend; yet, inasmuch as the minors were made parties defendants, and answered by guardian appointed for that purpose, this error in the proceeding was no ground for rescinding and annulling the decree after the term had passed.

And besides, it is a sufficient answer to the contention of the appellees in regard to the errors and irregularities in the proceedings of the Orphans' Court to say that that Court having jurisdiction of the subject-matter and of the parties, it had the right to decide in regard to all questions arising

in the progress of the suit, and its decision in the premises was binding upon the parties, unless reversed on appeal.

It follows from what we have said that the proceedings of the Orphans' Court, under which the tract of land in controversy was sold, and under which the defendants claimed title, were admissible in evidence, and the judgment below must therefore be reversed.

*Judgment reversed.*

(Decided November 23rd, 1894.)

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OTHO HULL AND WIFE AND WM. EUBANK vs. WM.  
DEERING & COMPANY.

*Fraudulent Conveyances—Grossly Inadequate Consideration—Fraudulent Conveyance of Individual Property by one Partner.*

A conveyance by an insolvent debtor of his tangible property to a trustee for the benefit of his wife for a grossly inadequate consideration is fraudulent and void as to his existing creditors, but will be allowed to stand as security for the value of the wife's separate estate acquired by the grantor as a part of the consideration for the deed.

A creditor of a firm is not entitled to assail a voluntary deed of his property by one of the partners because fraudulent as against creditors, unless he shows that the firm assets are insufficient to pay the firm creditors, and that there are no individual creditors of such partner, or that the individual property is more than sufficient to pay them in full.

Appeal from the Circuit Court for Washington County. The case is stated in the opinion of the Court. The bill of complaint in this case was filed by the appellees to set aside as fraudulent the conveyance of certain real estate situate in said county by O. Hull to Eubank in trust for Hull's wife. The property was sold under a decree, and the amount of net proceeds in the hands of the trustees was \$1,363.18. The deed by Hull to Eubank was for the purpose of secur-

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## Statement of the Case.

ing the payment to Hull's wife, Lou E. Hull, of the sum of \$8,000, evidenced by the bond of Hull, payable on demand, and it was covenanted that the grantor should remain in possession of the property until default be made in payment. The consideration set forth in the deed was "natural love and affection for his said wife, and the further consideration of her joining with him in conveying to Wm. T. Fitzpatrick a tract of land containing sixty acres, lying in Appomattox County, Virginia, it being her separate estate, and the further consideration of the sum of one dollar." The Court below (STAKE, J.), stated in its opinion that the said land in Virginia, owned by Hull's wife, "is unfenced and without any buildings; that there is some smoke-pipe clay on it, which depreciates it for agricultural purposes; that the pipe-clay has no value in the market as a mineral. \* \* These witnesses value the land at from \$2.50 to \$3 per acre." The decree of the Court below declared to be void the deed executed by Hull to Eubank, "as against the complainants and all other creditors of the said Otho Hull who may come in as parties to this suit, in so far as the said deed provided for securing to the said Lou E. Hull the payment of the sum of \$8,000; but it is further adjudged, ordered and decreed, by the authority of this Court, that the said deed from Otho Hull and wife to William Eubank, trustee, remain in force and effect to the extent, and to the extent only, of securing to the said Lou E. Hull the payment of a sum equal to the value of the tract of land situated in Appomattox County, Virginia, described in the deed of conveyance from her and her husband to Wm. F. Fitzpatrick, and from him to the said Otho Hull, containing sixty acres, at the valuation of \$2.75 per acre."

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*Alex. R. Hagner* for the appellants.

The bill of complaint here and the attachment proceed-

ings therein referred to are efforts on behalf of Deering & Co. to set aside the conveyance made by Otho Hull, the appellant, to Wm. Eubank, trustee, for the benefit of Lou E. Hull, and to acquire a lien on the individual property of Otho Hull for themselves over his individual creditors. There are no proceedings in this cause showing that the appellees have made any effort to obtain satisfaction of the claim, Exhibit No. 1, out of the assets of the firm of D. F. & Otho Hull: There has been no return by the Sheriff of *nulla bona* as to the firm. *Non constat* this partnership debt could be made out of the joint assets of the firm. By reference to the bill of complaint there are a large number of individual creditors of Otho Hull, the appellant, whose claims in law are ahead of the partnership debts with regard to his individual property. The appellants are seeking a preference by these proceedings over individual creditors.

Joint property of a partnership must be applied to partnership debts, and separate property to individual debts. *Glen v. Gill*, 2 Md. 1; *Berry v. Harris*, 2 Md. Chan. 463. If there be a joint fund ever so small the joint creditors will not be permitted to receive dividends of the separate estate, etc. *McCulloh v. Dashiell*, 1 H. & G. 104. Joint creditors in equity can only look to the surplus of the separate estate after the payment of the separate debts. *Berry v. Harris*, 22 Md. 37; *Simmons v. Tongue*, 3 Bland, 356; *Murrell v. Naill*, 8 Howard, 428; *Marme v. Murdock*, 13 Md. 179.

A party obtaining a judgment against a firm is not a judgment creditor of an individual partner in such a sense that he can attack a conveyance by said partner of individual property in fraud of creditors. *McCoy v. Watson*, 51 Ala. 466; 17 *Am. & Eng. Ency. of Law*, 1252.

The property in question was the individual property of Otho Hull. Therefore, the appellees, with regard to their claim marked Exhibit No. 1, against the firm of D. F. & Otho Hull, are not in the position to ask a Court to set

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Argument of Counsel.

aside the deed of conveyance in this case. The answer of Otho Hull sets up that there are sufficient funds of D. F. & Otho Hull to pay the claim of the appellees.

Lou E. Hull, the wife of Otho Hull, the appellant, owned a tract of land containing 60 acres, her separate estate, gotten from her parents in 1884. This tract of land was conveyed by her and her husband to Wm. T. Fitzpatrick, and by him conveyed to Otho Hull, the law of the State of Virginia requiring the above proceedings in order that a wife may convey to her husband her separate realty. This tract of land was the real consideration for the deed of trust. At the time of the execution of the deed of trust, lands in the State of Virginia were bringing high prices, minerals being found nearly everywhere. Otho Hull believed, as he swears, that it was valuable mineral land, and his object was to get the tract in order that he might induce monied men to go in with him to work the fire-clay and minerals. He considered he was getting value received for the deed of trust. Hull believed he was getting, by obtaining the 60 acres of land from his wife, full value for the deed of trust in question, which only conveyed his equity of redemption in his property in Hagerstown, which brought at the sale, after the prior liens were satisfied, \$1,363.10, now in the hands of the trustees to await further orders of the Court, which was all the said Otho Hull conveyed to his wife, in consideration of this tract of 60 acres of land in Virginia. The effort on the part of the appellees in rebuttal to depreciate the value of the 60-acre tract as late as 1893, should in no wise figure in this case. To determine whether the consideration is sufficient or not, the condition of things at the date of the deed must be regarded. *Zimmer v. Miller*, 64 Md. 298.

*William Kealhofer and J. Clarence Lane*, for the appellees.

The ability of Otho Hull to pay his debts is absolutely disproved by the evidence in the cause. He owned no property in this State which could be subjected to the pay-



ment of his debts, except that conveyed by the deed of trust to Eubank.

There is an enormous preponderance of testimony against Otho Hull, which leads to the conclusion of a fraudulent intent upon his part, and the *onus* of disproving the fraud rests upon him. As stated by the Court below, "A deed founded on a money consideration, which bears no adequate relation to the real value of the property, though valid as between the parties, may be assailed in chancery, by creditors, solely on the ground of inadequacy of consideration, and such a conveyance is voluntary to the extent of the difference between the consideration and the value of the property conveyed." *Worthington v. Bullitt*, 6 Md. 172; *McNeal v. Glenn*, 4 Md. 87; *Schaferman v. O'Brien*, 28 Md. 87; *Cone v. Cross*, 70 Md. 102; *Benson v. Benson*, 70 Md. 253; *Swann v. Dent*, 2 Md. Ch. 111; *Cunningham v. Dwyer*, 23 Md. 219; *Foley v. Bitter*, 34 Md. 654; *Fuller v. Brewster*, 53 Md. 358, 351; *Zimmer v. Miller*, 64 Md. 296, 300. Where the circumstances are such as to lead to the inference of fraud, *onus* of disproving it rests on the parties to the transaction. If, therefore, a grantor having creditors makes a disposition of his property under such circumstances as are proved in this case, it will follow that he was actuated by an intent, which cannot receive the sanction of the Court.

McSHERRY, J., delivered the opinion of the Court.

The decree appealed from in this case vacated and set aside as fraudulent a deed of trust executed by Otho Hull to William Eubank, and dated on the twenty-third day of September, 1890. The deed, in which Hull is named the party of the first part, Eubank the party of the second part, and Lou E. Hull, the wife of Otho Hull, the party of the third part, conveys certain real estate lying in Washington County, Maryland, to the party of the second part in trust, "to secure to said Lou E. Hull the payment of the sum of eight thousand dollars, evidenced by a bond of said Otho Hull of even date with" the deed, "and payable on de-

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mand." The consideration set forth in this deed is, first, natural love and affection ; second, the fact that the wife had joined with Otho Hull in conveying to William T. Fitzpatrick a tract of land containing sixty acres, lying in Appomatox County, Virginia, which land was her separate estate, and which Fitzpatrick conveyed immediately afterwards to Hull ; and thirdly, the sum of one dollar. The bill of complaint assailing this conveyance was filed February the ninth, 1891. Amongst other things it alleges that Hull and his brother, D. Frank Hull, were, in 1888 and 1889, engaged in business in Hagerstown as partners, under the firm name of D. F. & Otho Hull ; that they became indebted to the appellees in a considerable amount, and that, in addition to this indebtedness, Otho Hull also individually owed the plaintiffs several hundred dollars. Upon both of these claims foreign attachments were issued against Otho Hull before the bill was filed, and in both proceedings judgments appear to have been subsequently confessed by the defendant. The bill averred that the deed of trust was fraudulent, and that it had been made with intent to hinder, delay and defraud the appellees and other creditors of Otho Hull, many of whom, holding liens on the same property conveyed by the deed, were joined as co-defendants. The answer of Hull and wife denied the material allegations of the bill, and insisted that if there was anything due to the appellees, it was due by the firm of D. F. & Otho Hull, and that there were sufficient assets belonging to that firm with which to pay its indebtedness.

There is little or no difficulty about the law of this case. A voluntary conveyance made by a husband directly to his wife or to a trustee for her benefit, in prejudice of the rights of the grantor's subsisting creditors is, under Art. 45, sec. 1, of the Code, invalid. Such a conveyance is in prejudice of the rights of creditors when it strips the grantor of property which otherwise would have been available for the payment of his debts and leaves him in possession of no other property which can be discovered or reached. A debtor

has no right by a conveyance of this character to impede, hinder or delay his creditors in recovering payment of their claims; and it matters not, so far as respects its validity, how much intangible, hidden or concealed property may remain, if by a voluntary conveyance to his wife, or to another for her benefit, he renders it impossible, or even more difficult, for his creditors to enforce payment of the sums that are due to them. So far, then, as the consideration of natural love and affection and the nominal consideration of one dollar are concerned, the deed would be invalid as against creditors subsisting at its date whom it hinders and delays; and if nothing else remained to support it, it would of necessity fall when assailed by any one entitled to question it.

There remains the other consideration stated in the deed, viz., the conveyance by the wife of her separate estate situated in the State of Virginia. It is claimed by the appellant, Otho Hull, that this property was very valuable in consequence of large deposits of minerals and clay, and in his testimony he estimated it to be worth as much as ten thousand dollars. But he is supported in this by no other witness. On the contrary, the overwhelming weight of the evidence clearly and conclusively demonstrates that this Appomattox County land is of trifling value; that it contained no mineral deposits, and that it was worth only from two and a-half to three dollars per acre. Estimating it at even the highest of the figures named, its utmost value would not exceed one hundred and eighty dollars. A consideration amounting to no more than that sum would be wholly inadequate to support the deed of trust against the grantor's attacking creditors. The value of Hull's interest in the property conveyed by the deed of trust has been ascertained by a sale of that property and the payment of the liens upon it. The amount remaining, which has been treated as standing in the place of the property, is largely in excess of the sum of one hundred and eighty dollars.

Upon the hypothesis that Otho Hull was indebted when

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he executed the deed of trust in an amount larger than the value of his available and tangible assets, the deed, supported by the insufficient considerations alluded to, cannot prevail against the grantor's creditors except to the extent to be presently stated. And this brings us to an examination of Hull's financial condition at the date of the execution of the deed.

Whilst he has testified that he then possessed both real and personal property, situated in the State of Virginia, and had on deposit to his credit in a Lynchburg bank some fifteen hundred dollars, the certificates furnished by the Clerk of Bedford County, Virginia, and found in the record, show that by far the most valuable part of the real estate, the title to which appeared by the deed he exhibited to stand in his own name, he had conveyed to his wife long prior to his examination as a witness. He suppressed all reference to this latter conveyance, of the existence of which he was, of course, fully aware. The value of the residue of his real estate was insignificant, and his personal property, also situated in Virginia, even at its assessed valuation, was not sufficient to pay his indebtedness. The money to his credit in bank during the month of August, 1890, does not appear and was not shown to have been there when the deed of trust was made in September; nor has he given any account as to the disposition he made of it, if he has ever parted with it at all. The deed of trust substantially and practically stripped him of all the real property which he owned in Maryland, and his personal property, situated in Washington County, was seized and sold under executions issued on judgments recovered against him.

In the face of all the facts to which we have alluded, it is idle to say he was not insolvent when he executed the deed of trust, or to insist that the conveyance, whose good faith is now impeached in these proceedings, did not hinder or was not made with an intent to hinder, delay and defraud his creditors. It attempted and was obviously designed to put beyond the reach of his creditors the great bulk, if not

the whole, of his Maryland real estate which was available at the date of its execution for the payment of his debts; and it attempted to do this by a conveyance, part of whose expressed consideration made that conveyance, as to that part, purely voluntary; and the residue of whose consideration has been conclusively shown to be grossly inadequate. It was therefore clearly the duty of the Circuit Court to declare the deed invalid, except in so far as it might be allowed to stand as a security to the wife to the extent of the value of her separate estate conveyed through Fitzpatrick to the husband, as heretofore stated. That the deed should be allowed to stand as security for the value of the wife's separate estate acquired by the husband as a part of the consideration for the deed of trust is fully warranted by the authorities. *Hinkle v. Wilson*, 53 Md. 293; *Williams v. The Sav. Man. Co.*, 3 Md. Ch. Dec. 454.

What we have said thus far is based on the assumption that the appellees were entitled to file and prosecute the pending proceedings. But it has been insisted in the argument that the decree was erroneous because the debt due by Otho Hull to the appellees was not due by him personally, but by the firm of which he was a member; and that until the social assets have been first exhausted, no part of his individual property can be taken to pay the debts due by the copartnership. It is undoubtedly true, in a contest between creditors of a partnership and creditors of the members of that partnership, that the former must primarily look for payment to the partnership assets and the latter to the individual assets of the members of the firm. Logically no reason can be assigned why the same doctrine should not equally apply in favor of the debtor when his individual property has been seized by a creditor of a firm of which he is a member, and it is neither averred nor shown that there are no social assets. If the partnership be possessed of sufficient means to fully pay and satisfy all its debts, then no voluntary deed made by a member of that firm conveying his individual property can be fraudulent as to the firm creditor, or can

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hinder or delay him, because in the case supposed, the creditor would have no claim whatever upon the individual property for payment. If he has been neither injured, delayed, nor hindered by such conveyance, because of there being sufficient social assets to pay his claim, he manifestly has no standing in a Court of Equity to question or assail it. But beyond this he has no right to resort to the individual property until the firm's assets have been exhausted and the individual debts have been paid. Hence, until he shows that he has the right to resort to the individual property for the payment of the debt due by the firm, no disposition of that individual property can, in the nature of the thing, be prejudicial or injurious to him. Unless he shows that he has a right to avail of it for the payment of his debt, he cannot be heard to question the use its owner may see fit to make of it. It results thence, that to enable him to secure payment out of the individual property, he must aver and show that he is in a position to enforce that payment, or, in other words, that there are no firm assets or an insufficiency of firm assets, and that there are no individual creditors, or that the individual property is more than sufficient to pay them in full. Until he does this he is obviously in no position to impeach a conveyance of individual property, and he is in no position to impeach it because he has no claim upon or right to look to that property for payment. *McCoy v. Watson*, 51 Ala. 466; 2 *Lind. Part., star*, page 706.

But the case at bar cannot be controlled by these principles, because the appellees are not only creditors of the firm of D. Frank and Otho Hull, but of Otho Hull individually, against whom they hold a judgment for the amount of the latter claim. In their capacity, as separate creditors of Otho Hull, they have the undoubted right to assail the conveyance in question. The distribution of the fund is quite another question, but that is not now before us.

We have not deemed it necessary to discuss the question

of Otho Hull's separate indebtedness to the appellees. The proof in the record, including his confession of judgment upon the claim which the appellees asserted against him individually, is quite sufficient to set that controversy at rest.

As we have found no error in the decree appealed from, it will be affirmed with costs.

*Decree affirmed with costs above  
and below.*

(Decided February 27th, 1895.)

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ELIZABETH S. HUTCHINS vs. JACOB M. PEARCE  
AND OTHERS.

*Devise and Legacy—Dying without Issue—Will and Codicil Construed  
Together—Substituted Legacy.*

A testator bequeathed a sum of money to his daughter A., to be invested and held in trust by a trustee, with a limitation over in case A. should die without issue. *Held*, that A. took an absolute interest defeasible upon her dying without issue living at her death, and such property cannot pass under her will in the event of her so dying.

In such a bequest, the time to which the dying without issue refers is that of the death of the legatee and not of the testator.

Where the property given by the codicil is merely in substitution of that given by the will, it is taken with all its accidents.

By his will a testator bequeathed a sum of money to a trustee to be invested for the benefit of his daughters A. and B., and provided that in case they should die without issue, then such portion "shall become part of my estate and be divided between my surviving heirs." By a codicil, the testator annulled that part of his will directing the trustee to invest a sum of money for his daughters, and "in lieu thereof," gave to his daughter A. certain ground rents, without expressly making them subject to the limitation over, and by the next clause gave to his daughter B. certain other rents, adding "the same rents to be held in trust as directed in my foregoing

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## Statement of the Case.

will." A. died without issue, leaving a will by which the residue of her estate was given to the plaintiff. *Held,*

That the devise of the ground rents to A. in the codicil must be read into the will; that she took in them an equitable estate in fee, subject to be defeated in the event of her dying without issue living at the time of her death, and that consequently the rents did not pass under her will.

Appeal from the Superior Court of Baltimore City. This was an action of ejectment brought by Miss Hutchins, the residuary devisee under the will of Mary Louisa Pearce, to recover the property devised to the latter by the codicil to the will of John B. Pearce. The defendants were the surviving son and daughter of John B. Pearce and the husband of the daughter. The clause of the will of Mary Louisa Pearce, under which the plaintiff claimed, was as follows: "As my brother and sister are already amply provided for, and the greater portion of the property which I now own will probably go to them at my death, under the will of my father, and as I am especially desirous of providing for my friend hereinafter mentioned, who has been my companion for several years and probably will be for years to come if we shall both live, I devise and bequeath unto my friend, Elizabeth Sarah Hutchins, daughter of the late Dr. N. J. Hutchins, of Baltimore County, all my property and estate, real, personal and mixed, and all money and other things of which I may be possessed at the time of my death, and including my jewels and personal effects not heretofore disposed of, for her own sole and separate use absolutely." The case is further stated in the opinion of the Court.

The action below was submitted to the Court without a jury, under an agreed statement of facts. The plaintiff prayed the Court to rule "that if John B. Pearce purchased the property described in the declaration and made and published his will, a copy of which has been offered in evidence, and died, leaving surviving him his daughter, M. Louisa Pearce, and said M. Louisa Pearce made and pub-



lished her will, a copy of which has been offered in evidence, and died —, and that both of said wills have been duly proved, and the plaintiff is the residuary devisee mentioned in the will of said M. Louisa Pearce, then the plaintiff is entitled to recover. And the Court finds for the plaintiff."

And the defendants offered the following prayer: That the Court rules as a matter of law, that by the true construction of the will and codicil thereto of John B. Pearce, offered in evidence in this case, the plaintiff is not entitled to recover, under the evidence in this case.

The Court below (RITCHIE, J.) rejected the prayer of the plaintiff, and granted the prayer of the defendants, and the plaintiff appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*James McColgan*, for the appellant.

*First.*—By the clear language of the will of John B. Pearce, the limitation over in case of the death of his daughters without issue, contained in the fourth paragraph of the will of John B. Pearce, can only take effect upon the death of *both* of his daughters without issue—which event has not happened.

*Second.*—The limitation over by the will of John B. Pearce contemplates such limitation taking effect only in case of the death of his daughters during the life of John B. Pearce, the law favoring the vesting of estates at the earliest possible period. *Fairfax v. Brown, &c.*, 60 Md. 58-63; *Doe v. Considine*, 6 Wall. 458-475.

*Third.*—The property devised by the codicil to the will of John B. Pearce to Mary Louisa Pearce is not subject to the limitation over in case of her death without issue, it being the general rule that a gift or devise by a codicil is not subject to the same limitation as a gift by the will in the absence of express limitation over. 1 *Jarman*, 150;

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*Haley v. Bannister*, 23 Bevan, 336; *Mann v. Fuller*, Kay, 626; *Hill v. Jones*, 37 L. J. Ch. 465; *Buchanan v. Lloyd*, 64 Md. 308-312; *Cole v. Wade*, 16 Ves. 46.

The limitations in one clause of a will cannot be applied to another clause in which they are not contained. 1 *Jarman*, 461-463; *Biss v. Smith*, 2 H & N. 105; *Crimson v. Downing*, 4 Drewery, 132; *Right v. Compton*, 9 East, 273. *Thornhill v. Harris*, 2 Clark & Fin. 22-36; *Edelen v. Smoot*, 2 H. & G. 289.

*Fourth.*—The entire clause containing said limitation over is revoked and annulled by the first paragraph of the codicil of said John B. Pearce's will. Otherwise, no meaning is given to the words, "I annul *all that part of said will in which* I directed," &c. It is clear that this was the intention of the testator from the fact that he specifically provides that the rents given by the codicil are "to be held in trust as directed in my foregoing will," but says nothing of any limitation over, wherefore, the rule *Expressio unius exclusio est alterius* would apply.

*Fifth.*—The language of the will of M. Louisa Pearce, being an absolute devise of all the residue property not specifically devised or bequeathed, cannot be limited or restrained by any statement of opinion or any supposed intention not expressly and clearly intended to limit the absolute language of devise by her will. 1 *Jarman*, 448; *Saumarez v. Saumarez*, 4 Mylne & Craig, 339-341; *Church v. Mundy*, 15 Vesey, 406.

*Daniel M. Thomas* and *William A. Fisher* (with whom was *H. Marcus Denison* on the brief), for the appellees.

The appellees will contend: 1st. That the estate of Mary Louisa Pearce in the ground rents given her by the codicil to the will of John B. Pearce, was by the terms of his will made defeasible in the event of her dying without issue; and the happening of that event defeated her estate, and deprived her of the power of disposing of it by her will. 2d. That even if she had such power she did not in fact exercise it.

*As to the First Point.*—The will of the testator indicates a clear intent on his part to place his two daughters on an equal footing. To one he gave ground rents amounting to \$1,448.25 per annum, and to the other, ground rents amounting to \$1,419.50 per annum; and to each he gave the sum of \$5,000. So intent was he upon this that he does not make a separate declaration of the trusts and limitations imposed upon their respective shares, but makes a combined declaration of them, by stating that he appointed his son trustee for them in all the property he had devised to them, "both real and personal, the rents and incomes derived therefrom to be paid to them for their special benefit; and in case my daughters die without issue, then such portion or portions shall become part of my estate and be divided between my surviving heirs."

This phraseology is not strictly accurate, but its meaning is plain. He did not mean that the combined revenues of the two shares was to be paid to the two daughters jointly, but that the income from their respective shares was to be paid to each respectively. And by the limitation over, in the event of his daughters dying without issue, he evidently meant that if either died without issue, her portion, or if both so died, both portions should go over as directed.

The codicil shows no change of his intention in this respect, but that his sole object in making it was to substitute for the \$5,000, which he had directed to be invested by his trustee for each daughter, investments made by himself in the form of ground rents; and to make the substituted gift to each greater in value than the original. Following the structural plan of the will, he first designated the rents which he gave to each daughter, and then declared the trust upon which all of them were to be held; using these words: "*The same rents to be held in trust as directed in my foregoing will.*"

The contention of the appellant is, that as the codicil consists of two sentences, each forming a paragraph, the rents given to Mary Louisa being set forth in the first sentence,

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Argument of Counsel.

and those given to Mrs. Denison being set forth in the latter, and the words, "*the same rents to be held*," &c., follow a colon at the end of the latter sentence, these words are referrible only to the rents mentioned in that sentence, and do not affect the-rents given to Mary Louisa by the first sentence. But if this was the intention of the testator, the words used by him are singularly inappropriate and inaccurate, because the trust referred to is a trust, "*for my daughters*," and the result would be that property given to one daughter would be held in trust for both. Except under very peculiar circumstances, the construction of an instrument cannot be affected by mere punctuation. 1 *Jarman on Wills*, ch. 2, p. 33 (6th Am. ed.); *Weatherby v. Mister*, 39 Md. 629; *Osborn v. Farwell*, 87 Ill. 89; *Ewing v. Burnett*, 11 Peters, 54; *Gordon v. Gordon*, L. R. 5 H. L. 276; *Herring v. Stokes*, 2 Dr. & War. 98; *Arcularius v. Geisenhamer*, 25 Barb. 406.

The appellant's contention is that the phrase, "the same rents," &c., are relative words, and by the rules of grammar can apply only to the next antecedent, *i. e.* to the rents mentioned in the last paragraph of the codicil. It is submitted, that even if this be good grammar, it is not good law. Relative words are only referred to the next antecedent when there is no intention apparent to the contrary. *In re. Denny's Estate*, 8 Irish Rep. in Eq. 441; *Frazier's case*, 3 H. & J. 144, &c; *Fenny dem. Collings v. Ewestace*, 4 M. & Sel. 58.

The will and the codicil are to be construed as one instrument, and are to be reconciled as far as practicable. *Thomas v. Levering*, 73 Md. 451-455. "In order to ascertain the testamentary intention of the testator, it is necessary to examine the provisions of the two papers and see in what respects they are inconsistent with each other." *Johns Hopkins Un. v. Pinckney*, 55 Md. 382. When the thing bequeathed by the codicil is a mere substitution for that which is bequeathed by the will, it is taken with all its accidents. *Shaftsbury v. Marlborough*, 7 Simons, 237;

1 *Jarm. on Wills*, ch. 7, sec. 5, pages 174-183-186 (6 Am. ed.); *Holliday v. Holliday*, 74 Md. 466; 2 *Williams on Executors*, 1296.

But it is claimed for the appellant, that even if our construction of the codicil be correct, the limitation over of these rents, *in the event of the death of Mary Louisa without issue*, was only intended to take effect if she died before the testator; and that as she survived him, the property became hers absolutely. Now, it is submitted that this is just exactly what the testator did not intend. The will shows that he intended to keep his large estate in his own family. In regard to the share of his son, who was married and had a number of children, he had no apprehensions. But in regard to the shares of his daughters, both of whom were then unmarried, he felt it was necessary to make special provisions.

It is submitted, that the case of *Lednum v. Cecil*, 76 Md. 149, is a controlling authority to show that the failure of issue, on the part of Mary Louisa Pearce, must be construed to mean a failure of issue before or at her own death. See also—*Gambrill v. Forest Grove Lodge*, 66 Md. 17; *Comegys v. Jones*, 65 Md. 317; *Devecmon v. Shaw*, 70 Md. 225.

In the face of this authority, it is difficult to see how the case of *Fairfax v. Brown*, 60 Md. 50, relied on by the appellant's counsel at the trial below, can be held to affect this case. Even if it can be regarded as conflicting with the case of *Lednum v. Cecil*, the latter decision, being subsequent in point of time, must control.

It is submitted, however, that *Fairfax v. Brown* is an entirely different case from ours. The testator, in that case, having by his will given an estate in fee to his daughters, *by his codicil* provided for alternative limitations over, of their estates, both in the case of their death *without issue*, and of their death, *leaving issue*, and the Court held that these words were to be construed to mean death, with or without issue, as the case might be, *before the death of the*

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Argument of Counsel.

*testator's widow*; and rested its decision upon the ground that to hold otherwise would convert the estate in fee given to the daughters by the will, into estates for life, and this would "reverse and change the most important provisions of a long and carefully drawn will," and in the absence of clear language to show that this was intended by the testator, the Court declined to put a construction upon the codicil which would effect such a material change in the will.

In this case there is no limitation over in the event of the daughters leaving issue, and the effect of holding that the death referred to was death after that of the testator, would not be to cut down the estates given in fee to estates for life; and, furthermore, the limitation over is contained in the will, and not in a codicil. In other respects also the two cases differ from each other.

It is submitted that the case of *Fairfax v. Brown* is a peculiar one, and can only be regarded as an authority in cases precisely similar; *Henderson v. Henderson*, 64 Md. 188.

The rule governing the case of *Fairfax v. Brown* is stated by Mr. Jarman, and he says it is a *qualification of the general rule*. It operates when a devise in fee simple is followed by alternative limitations over which, collectively, provide for the event of the death of the devisee under all possible circumstances. In such cases the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. 2 *Jarman on Wills*, ch. 49, p. 721 (6th Am. ed.)

The other cases in which the death referred to is held to be a death occurring before that of the testator, are those in which the death is not coupled with any collateral circumstance. As to these, see 2 *Jarman on Wills*, ch. 48, p. 690 (6th ed.)

In cases where the death is associated with a collateral circumstance, the expositor of the will is placed in no such dilemma; for the testator himself having associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described, *at any time*. 2 *Jarm. on Wills*, ch. 49, page 698 (6th Am. ed.) "The general rule is that where the context is silent, the words referring to the death of the prior legatee, in some collateral event, apply to the contingency, happening as well *after* as before the testator." 2 *Jarm. on Wills*, ch. 49, page 718-719 (6th Am. ed.)

*As to the Second Point.*—Even if Mary Louisa Pearce be held to have had an absolute indefeasible estate in fee in the property in question, the same did not pass under her will. In construing this will it is the province and duty of the Court to read it in the light of the circumstances in which the testatrix was placed, and the nature of her property and estate. *Stannard v. Barnum*, 51 Md. 440, 452; *Hammond v. Hammond*, 55 Md. 580. Any evidence is admissible which in its nature and effect simply explains what the testator has written; in other words, the question, in expounding a will, is not what the testator meant as distinguished from what his words express, *but simply what is the meaning of his words*. *Warner v. Miltenberger*, 21 Md. 264, 212; *Hammond v. Hammond*, 55 Md. 581.

When the testatrix made her will she owned absolutely property to the value of \$24,000, not acquired under the will of her father. Under that will she owned the usufruct of ground rents held in trust for her amounting to \$1,448.25 per annum, which, capitalized at five per cent. (the basis adopted in the "Admission of Facts"), were worth \$28,965.

Under the codicil she *owned the usufruct* of ground rents held in trust for her, amounting to \$1,008 per annum, which, capitalized at five per cent., were worth \$20,180.

Md.]

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Now, it is evident from her own words, that the testatrix did not intend to give the appellant *all the property that she owned*, in the sense in which she uses the word "*own*," in the former part of the fifth clause of her will. She says the *greater part of what she owned* would probably go to her brother and sister. What she evidently means here is that the property acquired under her father's will and codicil, *being, as we have shown, the greater part of what she owned*, would, by the terms of the will, probably go to them, because it would go to them if they survived her, which she seems to have thought it probable they would do. This was, in her opinion, the destination of that property by the terms of the will. Whether she was right in thinking so is immaterial. The fact that she thought so is evidence that she did not think she had the power to dispose of it by her will. It is further evident, that she did not intend by her will to dispose of what she thought she had no power to dispose of, because it is not to be supposed that she would attempt to do what she thought she had no power to do. In the first part of this fifth clause, she assigns what she considers a sufficient reason for giving what she did to the appellant. Inasmuch as the greater part of what she owned would, by the terms of her father's will, go to her brother and sister, she did not think she would be doing them any injustice by giving the residue to her friend. And she, with sufficient clearness, defines what she did give to her, by describing it as that of which she was *possessed*, as distinguished from that which she *owned*, but did not have in *possession*.

PAGE, J., delivered the opinion of the Court.

This is an action of ejectment, the determination of which depends upon the construction of the last will of John B. Pearce. Mr. Pearce died in 1874, leaving surviving him a son and two daughters. At the time of his death, his son, Jacob M. Pearce, was forty years of age, married and with a family of five children, ranging from one to twelve years



in age. One of his daughters, Mary Louisa, was thirty-six years of age and unmarried; the other, Sophia Augusta, who has since intermarried with the defendant, John M. Dennison, was thirty-two years of age, and also unmarried. His will is dated the 23rd of February, 1872, and a codicil thereto, the 18th day of July, 1874. Mary Louisa Pearce died without having ever married, leaving a last will dated the 16th of June, 1883.

By his will John B. Pearce, after providing for the payment of his debts and funeral expenses, by the second clause bequeathed to his daughter, Mary Louisa, certain ground rents, particularly described, of the total annual value of \$1,448, "subject to the trust, however," thereafter created; and by the third paragraph, to his other daughter, Sophia, certain other ground rents, of the total annual value of \$1,419.50, also subject to the same trust. The fourth paragraph is as follows: "I will and bequeath unto my daughters, Mary Louisa Pearce and Sophia Augusta Pearce, each the sum of five thousand dollars, to be invested in good securities or ground rents, and to be held in trust by my son., J. Myers Pearce, whom I hereby appoint trustee for my daughters, in all the property I have devised to them, both real and personal; the rents and incomes derived therefrom to be paid to them for their especial benefit; and in case my daughters die without issue, then such portion or portions shall become part of my estate and be divided between my surviving heirs." After sundry minor bequests, he then bequeaths the rest of his estate to his son. The codicil is as follows: "I annul all that part of my said will in which I directed my son to invest for my two daughters five thousand dollars each; and in lieu thereof I give and bequeath to my daughter, Louisa, four ground rents on the west side of Oregon street, near Thompson street, in the city of Baltimore, each rent 117 dollars, payable in March and September; and six rents of 90 dollars each on the east side of Gilmor street, payable half yearly on the 1st of January and the 1st of July.

Md.]

Opinion of the Court.

"And unto my daughter Augusta, I give and bequeath five ground rents on the N. W. corner of Carey and Edmonson streets, each lot 100 dollars annually, payable on the 1st of January and 1st of July, and a rent of 400 dollars on the York turnpike, fronting thereon 100 feet, running back to Barclay street 400 feet, payable quarterly, in May, August, November and February; the same rents to be held in trust as directed in my foregoing will."

The first question that arises is upon the proper construction of the fourth paragraph of the will, and this, we are of opinion, is free from difficulty. Though the testator, in the first clause, uses no words of perpetuity, there is nothing in the will to indicate that he intended his daughters should take anything less than an absolute interest in the property. This, however, is subject to the limitation, that "in case my daughters die without issue, then such portion or portions shall become part of my estate, and be divided between my surviving heirs." The words "die without issue," unless a contrary intention appear by the will, must be construed, since the Act of 1862, ch. 161, to mean a want or failure of issue in the lifetime or at the time of the death of the person so taking. *Lednum v. Cecil*, 76 Md. 153; *Mason v. Johnson*, 47 Md. 355; *Devecmon v. Shaw*, 70 Md. 224; *Gambrill v. Forest Grove Lodge*, 66 Md. 17. And we are of opinion that this construction effectuates the intention of the testator, as gathered from a fair examination of the whole instrument when taken in connection with his surroundings and the objects of his bounty. He had three children, a son and two daughters, and to them he bequeaths his entire estate, with unimportant exceptions. The daughters were unmarried; one of them was thirty-two years of age, the other thirty-six. He must have contemplated the possibility of one or both dying without leaving children, and if that did so occur, it appears to have been his wish that such portions of his property as he had left them should pass to such of his own descendants as might then survive. To make this desire effectual, he created a trust,

which, by the very terms he employs, was not to commence until after his own death, and could not terminate, as to each portion, until the death of each of the daughters. This general intent, plainly exhibited as it is by the structural plan of the will, as well as by fair interpretation of the terms employed by the testator, would be entirely frustrated by construing the instrument so that the limitation can take effect only upon the death of the daughters or either of them in the lifetime of the testator. The property, however, described in the declaration, is part of that which was devised to Mary Louisa by the codicil, and it therefore becomes necessary to determine what the nature of the interest was that passed by its provisions. The terms which the testator here employs are: "I annul all that part of said will in which I directed my son to invest for my two daughters \$5,000 each; and in lieu thereof, I give" \* \* (by two clauses) certain ground rents to each of the daughters; and, at the conclusion of the second clause, are these words: "The same rents to be held in trust as directed in my foregoing will." The appellant, while conceding that these words apply to the bequests made to both daughters by the codicil, insists that the property is not subject to the limitations contained in the will. Now, it is a well settled principle that "the will and codicil are to be construed together as one instrument; but if there be any conflict or repugnancy between them, the codicil \* \* must operate in preference to the will." *Lee v. Pindle*, 12 G. & J., 305; *Thomas v. Levering*, 73 Md. 451. We do not think the codicil shows a change in the intention of the testator. It annuls only that part of the will in which the testator had directed his son to invest \$5,000 for each of his daughters, and in lieu of this substitutes certain ground rents; otherwise the fourth paragraph of the will remains unaltered. The gifts to the daughters by the will, were to be subject to a trust, of which the purpose was, to more effectually secure the retention of his property in his own family, and what is bestowed by the codicil is to be held in trust in the same

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Opinion of the Court.

manner. For the trust so created by the codicil, it would be difficult to assign any sufficient reason that can carry with it the imputation of an intention different from that to be gathered from the will itself. The will and codicil are inconsistent only in respect to the description of the property bestowed. *Johns Hopkins Univ. v. Pinckney*, 55 Md. 381. The things bequeathed by the codicil are mere substitutions for that which was given by the will, and must be "taken with all its accidents." *Shaftsbury v. Marlborough*, 7 Simons, 237. This was not the case in *Buchanan v. Lloyd*, 64 Md. 308. There the Court said, "there are no materials in the codicil or in the will and codicil together, of which we can predicate a limitation over to the children of Mrs. Winder," and to so construe the codicil would have the effect to curtail the effect and operation of the residuary clause in the will. A gift by the will is not to be cut down by uncertain expressions. *Johns H. U. v. Pinckney*, *supra*; *Mann v. Fuller*, Kay, 624. In this case, to carry out the general intention as gathered from a full examination of the entire will and the codicil, the devise of the ground rents in the codicil must be read into the fourth paragraph of the will, and the daughters respectively will take an equitable estate in fee, subject to be defeated in the event of their dying without issue living at the time of their respective deaths. *Thomas v. Levering*, 73 Md. 455. We think there is nothing in conflict with what we have said in *Fairfax v. Brown*, 60 Md. 58; *Dorsey v. Dorsey*, 9 Md. 40, or in *Hill v. Hill*, 5 G. & J. 88. The decision in *Fairfax v. Brown* was based upon the intention of the testator as indicated by the particular language of the will. The Court said, "after giving \* \* an estate in fee to his children \* \* it would not be a fair presumption that he intended to reduce the estate to an estate for life, if the terms used were of dubious and uncertain meaning." In *Dorsey v. Dorsey*, the devise was to his wife, "and in case of the death of both myself and wife, &c.," and it was held that such expressions unexplained are to be confined to the

event of death happening during the life of the testator. And in the same case the Court also said that, from the "whole character of the paper, such was the intention of the testator."

From what we have said it follows that we find no error in the ruling of the Court below, and the judgment will therefore be affirmed.

*Judgment affirmed.*

(Decided February 28th, 1895.)

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THE ROLAND PARK CO. *vs.* THE STATE OF  
MARYLAND.

*Statutory Construction—Intent of the Legislature—Bonus Tax on New Corporations.*

The Act of 1890, ch. 536, provided that every corporation incorporated since January 1st, 1890, should pay a certain bonus tax. This Act was approved April 8, 1890. *Held*, that the Act applies to all corporations created after April 8th, as well as to those formed since January 1st and before April 8th.

If the obvious purpose of a statute is beyond the literal meaning of the language employed, it will not be restricted by the narrow signification of the words; and in like manner, comprehensive terms will not include that which is not within the design of the statute, but the real intent will prevail over the literal sense of the language used.

The result which may follow from one construction or another of a statute is a potent factor in determining the legislative intent.

Appeal from a ruling of the Court of Common Pleas of Baltimore City (PHELPS, J.), by which it was determined that the appellant, a corporation incorporated on July 30, 1891, was liable to the State in this action for the second instalment of the bonus tax imposed by the Act of 1890, ch. 536.

Md.]

Argument of Counsel.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*John N. Steele* (with whom were *John E. Semmes* and *Francis K. Carey* on the brief), for the appellant.

Revenue statutes, being neither remedial nor founded upon any permanent public policy, are to be construed in favor of the tax-payer, and most strongly against the government. *U. S. v. Wigglesworth*, 2 Story, 309; *American, &c., Co. v. Worthington*, 141 U. S. 468; *Rice v. U. S.* 53 Fed. Rep. 910.

It is well settled that where the words of an Act are unambiguous, the Legislature will be intended to mean what it has plainly expressed, and there is no room for construction. *Maxwell v. State*, 40 Md. 273; *Leonard v. Wiseman*, 31 Md. 204; *Clark v. M. & C. C.* 29 Md. 283.

There is no ambiguity about the meaning of the word "since," and this Court will not consider itself at liberty to speculate as to what the Legislature may have intended, but will give the word "its plain, natural and ordinary import." "The proper signification of 'since,' is after, and its appropriate sense includes the whole period between an event and the present time." 22 *Am. & Eng. Enc. Law*, 785; *Monroe v. Acworth*, 41 N. H. 201. "'Since' may cover the whole of a period between an event and the present time, while 'subsequently' may refer to a particular time." *Anderson's Dictionary of Law*; *Jones v. Bank*, 79 Me. 195; *In re. Rosenfeld*, 7 Am. Law Reg. (N. S.) 619; see also *James' Bankrupt Law*, 129, 131.

In the act under discussion, "since" is used as a preposition. As a preposition it is thus defined by the Century Dictionary: "Ever from the time of; throughout all the time following; continuously after and from; at some or any time during the period following; subsequently to." And by Webster: "From the time of; in or during the time subsequent to; subsequently to; after; with a past event or time for the object."

The examples given in the dictionaries fix the precise meaning of the word beyond all dispute ; that is, a period of time, or any time, between some definite time in the past and the present time ; and, although it does mean after, yet it is in the limited sense just stated. It cannot be used to signify futurity. For instance: " My last was of the first current, since which I received one from your lordship." Howell, Letters I, V, 29. Is argument needed to show that, although the period of time which is written of is after the " first current," it is also limited by the time of writing and cannot be construed to mean any time after the time of writing. Again: " You know since Pentecost the sum is due." Shakespeare, Comedy of Errors, IV, 1, 1. This means that the sum has been due from Pentecost to the time of speaking.

*\*J. Alexander Preston and Robert Ludlow Preston, for the appellee.*

McSHERRY, J., delivered the opinion of the Court.

Whether the appellant is liable for the franchise tax or bonus imposed by the Act of 1890, ch. 536, is the sole question involved in this proceeding. The appellant is a body corporate, incorporated on July the thirtieth, 1891, under the general incorporation law, and its capital stock was limited by its charter to one million of dollars. The Act of 1890, which adds a new section to the Code, prescribes that " every corporation incorporated since January first, eighteen hundred and ninety, under any general or special law of this State, except cemetery companies, &c., shall pay to the State Treasurer, for the use of the State, a bonus of one-eighth of one per centum upon the amount of capital stock which said company is authorized to have," &c., &c. This act was approved and became effective on April the eighth, 1890. The contention of the appellant is that this statute is only applicable to corporations formed

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*\*The Court declined to hear counsel for the appellee.*

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*after* January the first and *before* April the eighth, 1890, and that the word "since," properly construed, makes the provisions of the act relate only to such corporations as were formed between January the first and April the eighth, 1890. This contention is founded on the assumption that the word "*since*" means, and necessarily means, and was intended to mean, a period of time beginning with the first of January, 1890, and ending with the date when the statute became effective. To support this contention we have been referred to various lexicons which define the word "since." We are not, however, dealing with a question of mere philology. What we have to do is to discover the legislative intention and to give to it, when ascertained in accordance with established canons or rules, full and complete effect. The mere words which the Legislature may use are not always controlling. If the obvious purpose of an enactment is beyond the literal meaning of the language employed, it will not be restricted in its scope and application by the narrow significance of its words; and equally, too, broad and comprehensive terms will not include that which is not within the design and the object of the statute. The real intent, when ascertained, will always prevail over the literal sense of the language, *State v. Milburn*, 9 Gill, 109; *Milburn v. State*, 1 Md. 17; because both the canons of verbal criticism and the rules of grammatical construction must alike yield to the manifest spirit and intent of an enactment. Or, as differently expressed, "Sometimes cases not within the words are held to be within the act, and other cases are by construction taken without the operation of the law, though covered by the language, according to the intent and design of the Legislature." *Wilson, &c. v. State, use of Davis*, 21 Md. 1. This intent or design may be gathered not merely from the language of the enactment, but also from the causes or necessity which prompted its passage, and from foreign circumstances. *Johnson and Wife v. Heald, Extr.*, 33 Md. 352; *Durousseau v. U. S.*, 6 Cranch, 307.



Now, the obvious purpose of the Act of 1890 was to raise a revenue for the treasury of the State. No reason has been assigned or can well be suggested for limiting its application to such corporations as were formed within the space of three months and eight days in the beginning of the year 1890. By its first section it added a new section, to be known as sec. 88 A, to Art. 81 of the Code of Public General Laws, relating to revenue and taxes, and thereby indicated that its provisions imposing the bonus should be a permanent and continuing part of the written law of the State, until repealed. The mere fact that it was included in, and by its express terms became a part of, the fixed and established revenue and tax-system, at least implies that its application was not designed to be of the short and restricted duration claimed. It was made an integral part of a revenue system, of which, had it been purposely confined in its application to so brief a space of time, it would properly have formed no portion. As the statute was distinctly a revenue measure, it is not apparent why, if it was deemed necessary to resort to it for the first three months of 1890, it was not equally necessary for the remainder of that year or until, in fact, its modification or repeal. But, in addition to this, the act contains inherent indications that it was designed to be continuous in its application. Its title declares that it is an act "providing for the payment by *every newly* created company of a bonus on its capital stock," &c., and suggests no restriction to those created before its passage and subsequent to the preceding first of January. And further on in the body of the act, provision is made for the imposition of a bonus of one-sixth of one per cent. upon the *increase* of the capital stock "of any of *said* companies or any company of like character *heretofore* incorporated." Now, if the literal and restricted meaning assigned, in the appellant's contention, to the word "*since*" is to prevail, then the only companies which would be liable to pay the bonus of one sixth of one per cent. upon an increase of their capital stock would be those formed after January the first, and before April

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the eighth, 1890, and those incorporated at *any time* prior to the passage of the Act of 1890. There is no conceivable reason why every corporation formed prior to April the eighth, 1890, should be liable upon increasing its stock to pay this bonus, and every one formed after that date should be exempt. This consequence flowing from the construction insisted on, would result in inequality, if not in injustice, and would, to a great extent, defeat the raising of revenue from this particular source. A result which may follow from one construction or another of a statute is always a potent factor and is sometimes in and of itself conclusive as to the correct solution of the question as to its meaning. *People, &c., N. Y. v. Rice*, 16 L. R. A. 836.

Looking to the object which the Legislature had in view in passing this Act, and considering the important circumstance that they carefully incorporated its provisions in the Code as a part of the revenue system, under the sub-title, "payment of taxes by corporations," we think the true reading of the statute includes *all* corporations formed after January the first, 1890, except those specially excluded, and that the enactment is not confined to those formed between that date and April the eighth of the same year. That this is what the Legislature meant, is made more apparent by the Act of 1894, ch. 114. By this act other classes of corporations besides those excluded by the Act of 1890, were exempted from paying the bonus, and it was specifically provided that no corporation incorporated prior to the date of the Act of 1894, "shall in any manner by this act (the Act of 1894), be relieved or released from the payment of any bonus now due and owing by it, or which shall become due and payable by it prior to the date of the passage of this act, under the provisions of ch. 536 of 1890." If the Act of 1890 was intended to apply only to corporations formed between January, the first and April the eighth, 1890, there was no necessity for enlarging, by the Act of 1894, the classes of corporations exempted from paying the bonus.

The Court below gave to the Act of 1890 the same construction that we have placed upon it, and its judgment in favor of the State for the bonus due by the appellant will therefore be affirmed.

*Jndgment affirmed with costs above  
and below.*

(Decided February 28th, 1895.)

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ROBERT POOLE vs. JAMES T. ANDERSON, EXEC-  
UTOR.

*Sale of Real Estate under a Testamentary Power.*

Where a testator devises his estate to his executors and trustee, who are different persons, giving them a right to sell, &c., the trustee should unite with the executor in exercising the power of sale.

Appeal from an order of the Orphans' Court of Baltimore City, overruling exceptions filed by the appellant to the ratification of a sale of real estate made by the appellee as executor of the will of Thomas D. Anderson.

The first and eighth clauses of the said will are as follows :  
1st. "I give, devise and bequeath to my executors and trustees hereinafter named, and the survivor of them, and the heirs, executors and administrators of the survivor, all my estate, real, personal and mixed, wherever situated or being, with full power and authority to do whatever may be proper and necessary to the performance of the duties hereby imposed on them, either in effecting sales, executing and acknowledging deeds, making compromises, granting releases or otherwise. In special trust and confidence, nevertheless, for the uses and purposes following, that is to say," &c.

8th. "And should it at any time become necessary or

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expedient, in the opinion of my executors and trustees, or the survivor of them, or those representing at the time the trust hereby created, to change the investments authorized in the second, third and fifth articles of my will, or to sell, lease or otherwise dispose of, during her lifetime, at the instance of my sister, Jane M. Anderson, my house and lot on Druid Hill avenue, I hereby authorize my said executors and trustees, and the survivor of them, to change such investments, or any of them, in their discretion, as well as to make sale of the house and lot aforesaid, executing and acknowledging all such conveyances as may be necessary; the proceeds of such sale to be held by said trustees for the benefit of my said sister for life, and after her death to fall into the residuum of my estate."

Under the will the same persons were both executors and trustees, but, by a codicil, the Safe Deposit Co. was appointed trustee, and it was declared that this should not interfere with the appointment of the executors. The sale excepted to was made by the executor alone. The Orphans' Court, considering that under the will the rights and duties of the executor and trustee were consecutive and not concurrent, overruled the exceptions and ratified the sale.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Herbert B. Stimpson and Randolph Barton, Jr.*, for the appellant, cited: *Perry on Trusts*, secs. 294, 295, 766; *Chance on Powers*, sec. 603; *Latrobe v. Tiernan*, 2 Md. Ch. 474; *Keplinger v. Maccubbin*, 58 Md. 207; *Wykham v. Wykham*, 18 Ves. 413; *State v. Cheston*, 51 Md. 352; *Watkins v. State*, 2 G. & J. 220; *Thomas v. Woods*, 1 Md. Ch. 304; *Hanson v. Worthington*, 12 Md. 476; *Woerner's Law of Admn.*, Vol. 2, sec. 339; *Bentham v. Wiltshire*, 4 Mad. 44; *Magruder v. Peter*, 11 G. & J. 239.

*Thomas Ireland Elliott*, for the appellee, cited: *Keplinger v. Maccubbin*, 58 Md. 203; *Warner v. Sprigg*, 62 Md. 15;

*Long v. Long*, 62 Md. 66; *Hoffman v. Hoffman*, 66 Md. 568.

FOWLER, J., delivered the opinion of the Court.

This is an appeal from the Orphans' Court of Baltimore City, and the only question presented is whether the sale of certain real estate already made and reported to that Court shall be ratified, or whether it shall be set aside and the property resold in order that the trustee under the will shall join the executors in executing the power of sale conferred by the will of the late Thomas D. Anderson of Baltimore City. The solution of this question depends entirely upon the construction of the will. If the doubt now suggested existed when the sale was made by the executor alone, it is to be regretted that the trustee under the will was not joined in executing the power of sale for the sake of avoiding the delay and expense of this litigation. But as the question is presented we must dispose of it, and we will do so briefly.

By the first clause of the will, and indeed generally wherever the testator gives authority or power to the executor over the real estate, he appears to have joined the trustee with the executor. Thus, in the first clause, "I give, devise and bequeath to my executors and trustees, &c., all my estate, real, personal, &c., with full power and authority to do whatever may be proper and necessary in the performance of the duties hereby imposed on them, either in effecting sales \* \* \* or otherwise." And in the eighth clause, his "executors and trustees" are authorized to change investments, or to sell, lease or otherwise dispose of" \* \* \* his house and lot on Druid Hill avenue. And likewise in the ninth clause, both the executors and trustees are authorized to execute and acknowledge such conveyances as may be necessary to change certain investments. It would seem, therefore, except for the ingenious suggestions as to what might have been the intention of the testator, that the plain and simple meaning

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of the language used by him is that both the executors and trustees were to join in the sale. And inasmuch as it is entirely immaterial, so far as the object of this proceeding is concerned, namely, the securing of a good title, which view shall be adopted, we prefer that which appears to us to be indicated by the language of the will.

We cannot assent to the view that the testator had no power to require the power of sale to be exercised jointly by the executors and trustees. If such were his intention, "that intention, if not contrary to public policy," or in violation of any rule of law or statutory provision, must have full force and effect. *Abell v. Abell*, 75 Md. 44.

Deeming it unnecessary to comment upon the authorities cited, and basing our conclusion altogether upon what we think appears to be the intention of the testator as disclosed in his will, the order appealed from will be reversed. Costs to be paid out of the proceeds of sale.

*Decree reversed and cause remanded.*

(Decided February 28th, 1895.)

THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* THE SMITH & SCHWARTZ BRICK COMPANY.

*Opening Streets—Appeal from Assessment of Benefits—Evidence to Show Value of Land and Amount of Benefit—Sales of other Property—Practice.*

Where a party appeals under Baltimore City Code, Art. 48, sec. 10, from the assessment of benefits in the award of the Commissioners for Opening Streets, the question as to the amount of damages awarded to the same party for opening the same street is not open to review on such appeal.

The burden of proof in such case is on the city to establish the amount of benefits accruing to the land of the abutting owner by the opening of the street.

The trial Court cannot be required to permit the book of the proceedings of the Commissioners, in regard to the opening of the street, to be taken to the jury room.

Where a lot of ground assessed for benefits from the opening of a street is below the level of the same, and an appeal is taken by the property owner from the assessment of benefits, evidence tending to show the cost of filling the lot to the level of the established grade is relevant, when it has been testified that the proper mode of determining the increase of value is by considering such cost.

The evidence in such case should be directed to proof of the market value of the land in its present condition, and then to the question how much will that value be increased by opening the street.

In order to ascertain the market value of a lot of ground, evidence of prices paid for similar land in the vicinity, at voluntary sales, within a reasonable time, is admissible.

The opinions of witnesses acquainted with the land in question, and having sufficient knowledge of the subject, are admissible to prove its market value, and the question whether a witness is qualified to give an opinion must be left in a large measure to the discretion of the trial Court.

Appeal from the rulings of the Baltimore City Court (WRIGHT, J.), on the trial of an appeal from the award of

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the Commissioners for Opening Streets in Baltimore City, in the matter of the opening of Madison street, from Patterson Park avenue to Grove alley, assessing benefits to the Smith & Schwartz Brick Company. The exceptions to the evidence are stated in the opinion of the Court. The appellee offered the following prayers :

1. "The property owner prays the Court to instruct the jury, that in making up their verdict the only matter for their inquiry is the amount of increase in the actual market value of the lots fronting on Madison street, which will be caused by the acquisition through these proceedings, by the Mayor and City Council of Baltimore, of title to the land in the bed of said street to be used as a public street, and their verdict should be limited to such increase, if any there be, and they cannot enquire into or take into consideration the amount allowed by the Commissioners for Opening Streets to the said property owner as damages for the land in the bed of said street. (Granted.)

2. The property owner prays the Court to instruct the jury that the burthen of proof rests upon the Mayor and City Council of Baltimore to show to the satisfaction of the jury the extent of the increase in the market value of the lots of said property owner binding on Madison street, as the result of the opening of said street, as the opening is defined in the first prayer of said property owner. (Granted.)

And the Mayor and City Council offered the following prayers :

*1st Prayer of City.*—The Mayor and City Council pray the Court to instruct the jury that, in assessing benefits for opening Madison street, the jury cannot indulge in vague speculation, or conjectures ; that they are to assess against the property of the abutting owners such benefits, if any, as it is, in their opinion, both from viewing the land and hearing the testimony, fairly and reasonably apparent that the property of such abutting owners will receive from the proposed improvement, other than the general benefit to the community at large, and that nothing is to be consid-



ered a benefit which does not enhance the value of the property. (Granted.)

*2nd Prayer of City.*—The fact, if it be a fact, that some of the lots assessed for benefits will require large expenditures in money or labor before they are brought into a condition to be used, does not excuse them from the payment of benefits; provided the benefits assessed against such property do not exceed the increase in the value of the property caused by the proposed opening of Madison street. (Granted.)

*3rd Prayer of City.*—The jury have the right, and it is their duty, if they think the amount awarded to the appellant, the Smith & Schwartz Brick Company, for the lots taken for the bed of Madison street, more than the fair market value of such lots so taken at the present time and in their present condition, to reduce the said award to an amount equal to such fair market value of such property in its present condition, at a fair and not at a forced sale. (Rejected.)

The inquisition of the jury assessed the benefits accruing to the lots in question at \$7,478, and the Mayor and City Council appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Thomas G. Hayes, City Counsellor, and William S. Bryan, Jr., City Solicitor, for the appellant.*

No Court could, it is submitted (unless it considered itself bound by the stubborn words of the statute), deem it just and proper to allow the property holder to represent through one set of agents to the Board of Commissioners, that the land through which the projected street will run is very valuable, and thus have both the benefits and damages placed by them at a high figure, and then accepting the damages awarded on this erroneous basis of the value of the land, show through another and different set of agents

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that the land is really of very little value and is incapable of any very beneficial use, and that the benefits as assessed are therefore too high, to allow the property owner to keep the heavy damages awarded on the one theory and require him to pay light benefits assessed on the opposite theory. This, to a plain man, would look very like a fraud on the general taxpayer. And yet, if this ruling is to stand, this is what will frequently occur.

The benefits and damages, in the very nature of things, are relative. It is only the *difference* between the two that is really material to either the city or the taxpayer. In making a settlement the one is always set off against the other, and it is only the difference between them that is ever paid by the property holder, or the city, as the case may be. (Article 48, section 5, Baltimore City Code.) It is, therefore, absolutely essential to any approximation to fairness to the parties concerned that *the same judgment* as to the valuation of the land affected should control in awarding both.

The second prayer of the appellee as to the burden of proof should have been rejected. As this is *an appeal* from the action of a board of sworn public officers of a *quasi* judicial character, it is to be presumed, until the contrary is made to appear, that their action was right; and so far as there is "any burden of proof" in the case at all, it is upon the property holder to show that the original assessment, made by the Commissioners, after giving it a full hearing, was erroneous. The property owner is allowed to open and close. *Burt v. Wigglesworth*, 117 Mass. 306.

The enquiry really is, "Did the Street Commissioners make a mistake?" It cannot be that the property owner can have the very material advantage of opening and closing the case before the jury on the theory that he is the plaintiff, and then insist that we should bear the burden always put upon the plaintiff. But it is misleading to speak of a burden of proof in a case which does not depend upon the evidence, and where the verdict was not to be "according

to the evidence." The jury had the right and it was their duty to consider the *view* of the property. The award was not to be controlled by the testimony. *Archer's case*, 9 G. & J. 479.

The evidence admitted below as to the cost of filling certain of the lots assessed for benefits up to the grade of the street was clearly irrelevant. The value of the land as it lay without a street through it, and then its value as it lay after the street is run through it, being ascertained, the difference between the two is the benefit derived from the street. Opinions and surmises as to what it would cost to place the land in a condition for sale to be followed by speculative opinions as to what the land will *then* be worth are too remote and uncertain to be safeguards to the jury. *Burt v. Digglesworth*, 117 Mass. 306; *Friedenwald v. Baltimore*, 74 Md. 125. As said in *C. P. R. R. v. Pearson*, 35 California, 263, "the question for the Commissioners to ascertain and settle was the present value of the land in its then condition, and not what it would be worth if something more should be annexed to it at some future time."

Evidence of the prices received at particular sales of lots of ground in the neighborhood of the land being valued was not admissible. There are so many elements other than the value of the land that contribute to fix the price received at a sale of real estate; so much depends on the necessities and intelligence of the parties to the contract, upon the purposes for which the land is needed, the urgency of the need and the peculiar adaptability of the land sold to supply those needs, that it has been almost uniformly held that individual sales are not admissible as evidence in chief. *Shuson v. Chicago, etc.*, R. R. 27 Minn. 287; *East Pennsylvania R. R. v. Heister*, 40 Pa. St. 53, 55; *Pittsburg, etc.*, R. R., v. *Vance*, 115 Pa. St. 331; *Hays v. Briggs*, 74 Pa. St. 374; *Penna. and N. Y. R. R. v. Bunnell*, 81 Pa. St. 414; *C. P. R. R. Co. v. Pearson*, 35 California, 247. Apart from this the price per acre paid for particular ground three years ago could not be evidence. Assuming, and it may

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be a very violent assumption, that the price Mr. Smith gave for it was its market price *then*, it does not follow that it is its market price *now*. Such evidence has been expressly decided to be inadmissible. *Detrick v. L. & N. R. R. Co.* 12 Nebraska, 229; *G. C. & S. F. Ry. Co. v. Lyon*, 2 Texas Ct. of Appeals, Civil Cases, sec. 139.

*Bernard Carter*, for the appellee.

It was held in *Moale v. M. & C. C. of Balto.*, 5 Md. 324, that evidence of the sales of the land itself, and of other similar land in the vicinity, made within a reasonable time before the period in question, is admissible to show its market value. In view of this direct decision, it is not necessary to look either at the reason of the thing or to decisions in other States. But it will be found, not only that the reason of the thing is in accord with the Maryland decision just quoted, but the great weight of authority is to the same effect.

The testimony is declared to be admissible by the Courts in Massachusetts, New York, New Hampshire, Illinois, Iowa and Wisconsin. I select from among the cases in these States, the following: *Wynan v. Lexington, &c., R. R. Co.*, 13 Metcalf 316; *Paine v. Boston*, 4 Allen, 168; *Shattach v. Stoneham R. R.*, 6 Allen 115; *Benham v. Dunbar*, 103 Mass. 365; *N. Y. L. R. R. v. Arnot*, 27 Hun. 151; *St. Louis R. R. v. Haller*, 82 Ill. 208; *Colbertson & Blair Co. v. Chicago*, 111 Ill. 651; *Cherokee v. S. C. & B. Co.*, 52 Iowa, 279; *March v. Portsmouth & Concord R. R.*, 19 N. H.; *Watson v. Milwaukee, &c. R. R. Co.*, 57 Wis. 332; *Pierce on R. R.*, page 224. In regard to the degree of similarity which must exist, and the nearness in respect of time and place, no general rules are laid down; these are matters with which the trial judge is usually conversant, and they must rest largely in his discretion. 6 Allen, 115; 103 Mass. 365.

But in addition to the evidence of sale of the property itself, and of other similar property, it is well settled that

the other kind of evidence, above mentioned, is admissible to assist the jury in ascertaining the value of the property in question; that is to say, the opinions and judgments of intelligent and practical men acquainted with the land, its value, and the subject-matter of improving and developing such land, may be given in evidence to show its market value before the improvement in question (in this case a street) is made, and what will be its market value after such improvement; and that such witnesses may be required to give the reasons on which the opinions they express are based, either on direct-examination or cross-examination; and as to the admissibility of this character of evidence, there does not seem to be any conflict of authority. The authorities on this point will be found cited and approved in *Elliott on Roads and Streets*, 197, 198; *Pierce on Railroads*, 225, 227; *Lewis on Em. Domain*, sections 436, 437. Among those cited we refer to *Dwight v. County Commissioners*, 11, Cushing 201; *Shaw v. City of Charlestown*, 2 Gray, 109, 110; *Illinois & W. R. R. v. Vanhorn*, 18 Illinois, 258; *Dickenson v. Fitchburg*, 13 Gray, 546; *Sexton v. North Bridgewater*, 116 Mass. 209; *Hawkins v. Fall River*, 119 Mass. 94.

It is very clear that the only way that the condemnation of land for a street can benefit the land binding thereon is that it is the *first* step towards the construction of a *usable* highway or street on which houses to be built shall bind; and it is equally certain that in most cases at least this *first step* is absolutely inefficacious until the other steps are taken, to-wit, the conversion of the hills and valleys which still remain after the condemnation into a graded surface (and as people do not *ordinarily* buy houses in the city on streets not paved, the grading and paving therefore go together), until the street is paved; and therefore the best way in which lots can be sold or leased by virtue of their frontage on a street is by offering them for sale or lease on a graded and paved street.

Now, to whatever extent the putting of a graded and

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paved street through land has increased its market value over and above what its value was before it had such street, that increase in value has come from two things: 1st, the acquisition of the title to the bed of the street, and 2d, the grading and paving thereof. Therefore, to ascertain what amount has been added to the value of land in the city of Baltimore, by the condemnation *only* of the land for the street, the very *best* way, and, indeed, *the only practicable* way, is to ascertain what the market value of the land will be when it had not a theoretical *or unusable* highway, but a real city street, that is, a graded and paved one; and then by ascertaining what was the value of that same land before it had the street, and what it will cost to put the land itself into a condition to be offered as building lots, and the cost of the grading and paving the street, we ascertain all the elements which have entered into its value as building lots, on graded and paved street, except the element derived from the condemnation simply, and therefore we get this latter element by subtracting from the value of the lots on the graded and paved street, the sum of the value of the land as it originally stood, and the cost of placing it and the street in a condition to yield the increased value which it has when so ready to be sold as building lots.

Boyd, J., delivered the opinion of the Court.

In this case we are called upon to review the rulings of the Baltimore City Court at the trial of an appeal by the Smith & Schwarz Brick Company, from an award of the Commissioners for Opening Streets in the city of Baltimore, assessing benefits to said company in the matter of opening Madison street from Patterson Park avenue to Grove alley in said city. There are nine bills of exceptions in the record which we will consider in their order. The first presents one of the most important questions to be determined by us. The Mayor and City Council of Baltimore moved the Court to direct the clerk to swear the jury to inquire both

as to benefits and damages awarded to the company. The Court overruled the motion and instructed the clerk to swear the jury as to benefits only, which was accordingly done. The city contends, that notwithstanding the company only entered an appeal from the assessment of benefits, the whole action of the Commissioners ought to have been reviewed and the jury required to inquire into the assessment of damages as well as benefits.

That proposition is disputed by the company, which contends that the Court was right in limiting the inquiry of the jury to the benefits assessed to it, that alone being the subject and cause of the appeal. It is necessary for us to examine the statutes and ordinances under which these proceedings were conducted.

By section 806 of Article 4 of the Code of Public Local Laws, it is enacted that "The Mayor and City Council of Baltimore shall have full power to provide for laying out, opening \* \* \* \* any street \* \* \* \* to provide for ascertaining whether any and what amount in value of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements within or adjacent to said city, for which such owner or possessor ought to be compensated, or ought to pay a compensation; and to provide for assessing and levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the amount of damages and expenses which they shall ascertain will be incurred in locating, opening, \* \* \* \* any street \* \* \* in said city; to provide for granting appeals to the Baltimore City Court from the decisions of any Commissioners, or other persons appointed in virtue of any ordinance, to ascertain the damage which will be caused or the benefit which will accrue \* \* \* and for securing to every such owner and possessor the right \* \* to have decided by a jury trial whether any damage has been caused or any benefit has accrued to them, and to what amount," etc.

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The ordinance of the city passed in pursuance of that statute provides for the appointment of three Commissioners for Opening Streets. They are required to ascertain whether any and what amount of damages the owners of the property will sustain by the opening of the street, for which they ought to be compensated.

Having ascertained the whole amount of damage for which compensation ought to be awarded and the probable expenses in the proceeding, they are then required to assess all the ground and improvements within and adjacent to the city, the owners of which they decide and deem to be directly benefited by the opening of the street. If the direct benefits assessed do not equal the damages awarded and expenses incurred, the difference is to be paid by the city and provided for by a general levy. An opportunity is then given to interested persons to appear before the Commissioners, who can review their own proceedings, and when they make their final award of damages and benefits they file them with the Register of the City, who gives notice through the newspapers of the right of parties affected by such awards to appeal to the Baltimore City Court.

Section 10 of Article 48 of the Baltimore City Code provides for an appeal by "any person or persons or corporations who may be dissatisfied with the assessment of damages *or* benefits, etc.," by petition in writing to the Baltimore City Court. That Court is then required to fix a day to hear any such appeal and to direct the Clerk to issue a *subpœna duces tecum* to the Register of the City, requiring him to deliver to the Court the record of proceedings of the Commissioners, and all maps, plats, documents and papers connected with such record, and the Court is given "full power to hear and fully examine the subject and decide on the said appeal." Provision is made for trial by jury of any question of fact, and if necessary for them to view any property in the city or adjacent thereto, to ascertain and decide on the amount of damages or benefits under the direction of the Court. The Court is also vested



with the power to amend and supply defects and omissions in the record of the proceedings of the Commissioners and to increase or reduce the amount of damages and benefits assessed. It is contended by the attorneys for the city that this section of the ordinance brings the whole case before the Court, and therefore it was proper to direct the jury to review the action of the Commissioners in assessing the damages as well as the benefits. But we do not find anything in that section or the other provisions of the law to sustain that contention.

The Commissioners for Opening the Streets, in assessing damages, are required to value the property to be taken for the bed of the street as if no street was to be opened, and in estimating the value of the property to be condemned are not to consider the fact that a street is to be opened. *Moale v. Mayor, etc., of Baltimore*, 5 Md. 334. They are required to fix the compensation to be paid to the owners for the ground or improvements to be taken from them without regard to the use to be made of them. They then ascertain the aggregate of such damages or compensation, and having added the estimated expenses of the proceedings, they are prepared to furnish the city with the cost of opening the street. That part of their work is completed (subject, of course, to their right of revision, appeal, etc., as provided by the ordinance.) The next step taken is to determine where the money is to come from. They then decide whether there is any ground or improvements in or adjacent to the city, the owners of which will be *directly benefited* by the opening of the street. Such as they find will be so benefited they assess to the extent of such direct benefits, and if the aggregate of the benefits so assessed is not sufficient to pay for the opening of the street, the balance is made up by the city by a general levy. In other words, they take such property as is needed for the bed of the street and allow the respective owners compensation for it according to its *then market value*; they then direct that A, B and C, as owners of ground or improvements some-

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where in or adjacent to the city, will be *directly* benefited *after the street is opened*, determine how much, and so assess them. If there is a shortage in the benefit column the account is balanced by the city. It matters not whether A's property thus to be benefited is adjoining to or a part of the property taken for the bed of the street, or whether it is on another square on the street to be opened or in some other locality; if it will be *directly* benefited he is assessed accordingly and called upon to contribute to the payment for said street to the extent he is so benefited. It seems clear that the two transactions of fixing damages or compensation, and of assessing benefits, are separate and distinct. If, therefore, A is satisfied with the damages allowed him, but is dissatisfied with the assessment of benefits (to use the language of the ordinance), why should his appeal from the latter necessarily carry with it the consideration of the former? By limiting his appeal to the one, as was done in this case, he notifies the city he is satisfied with the other. Both have been made by the city through its officers, and if it is not satisfied with either it can now appeal, notwithstanding the assessment was made by those of its own selection. There is therefore no reason why the jury should review the action of the Commissioners in fixing damages on an appeal from the assessment of benefits, and we do not think a proper construction of the ordinance would have justified the Court in granting the city's motion.

There is nothing in the fact that the whole record of the proceedings of the Commissioners must be brought before the Court to sustain the city's contention. It might disclose such defects and omissions as the Court could amend or supply, which should be corrected, and it would be very difficult, if not impossible, to properly review the action of the Commissioners in either fixing damages or assessing benefits, without having the whole record before the Court. If an appeal is taken by a person whose property is assessed for benefits, but has no claim for damages, none of his property being taken, the whole record and all proceedings

are brought before the Court. If some other company had owned the ground included in the bed of the proposed street, the Court could not have permitted the jury on the appeal of the Brick Company to increase or reduce the amount of damages allowed the other company, except by consent of the parties; and we see no reason why the jury should be permitted to increase or reduce the damages allowed the Brick Company when it has only taken an appeal from the benefits assessed against its property.

The jury is authorized by the ordinance to ascertain and decide on the amount of damages *or* benefits, clearly meaning that it can ascertain the amount of the one before it by appeal, but not of both, unless an appeal has been taken from both. The Court therefore committed no error in overruling this motion of the city.

The second and third bills of exceptions can be considered together. The evidence shows that a number of the lots of the company which will front on the proposed street, and have been assessed for benefits, were below the established grade of the street. The company offered to prove the amount of filling necessary to bring them to that grade, to fit them for use for building purposes. The city objected, but the Court overruled the objection and permitted the company to prove the estimated amount of filling necessary in each of the lots. In such cases jurors are entitled to have before them any facts that will aid them in reaching proper conclusions. The opening of the street having been determined to be a direct benefit to these lots, the next inquiry was how much will they be benefited. Different modes may be adopted for determining that question. A lot which would be left eight feet below the grade of the street after it is opened, would not be benefited, as much as it would be if on the level of the proposed street.

Hence, in ascertaining the amount of benefits, testimony tending to show the cost of filling the lots to the level of the established grade will be relevant. The jury was authorized by the ordinance to view the premises, and did so

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in this case. When they went upon the property the ground to be included upon the bed of the street might appear to be level, or nearly so, with that adjoining it on either side, and hence, in assessing benefits, they might have been misled, unless they were informed how much filling would be required to bring the adjoining property to the level of the established grade and what the cost would be. If a lot was worth one thousand dollars before the opening of the street and would be worth two thousand dollars after it was opened, without any work being done on it, the benefit to it would manifestly be one thousand dollars; but if it would cost five hundred dollars to bring it to the grade of the street, so as to give it the value of two thousand dollars, it is equally clear it would really only be benefited five hundred dollars. Some of the witnesses testified that the proper way of determining how much the lots would be benefited is to ascertain the market value of the ground fronting on the line of the street in its present condition before the street is condemned, to which add the cost of placing the lots and the street in such condition as that the lots could be disposed of with a front on Madison street, graded, curbed and paved, and determine what the market value of the lots would then be. Then subtract from that the cost of grading the lots, and of grading, paving and curbing the street, added to the present market value of the lots, and the difference would closely approximate the benefit to be derived from the opening of the street. If that be correct, which was for the jury to determine, they were entitled to be informed on all these subjects. The Court could not say, as a matter of law, that the jury could not consider that method of reaching a conclusion in the face of the testimony of experienced and competent men that it was the correct method. It may be much more difficult to fix a value on lots fronting on ungraded and unpaved streets than it is to determine the value of those on a graded and paved street, and inasmuch as city lots are not generally disposed of for building purposes until the streets on which

they front are graded and paved, it would reflect some light on the question at issue, by giving the jury some information on these subjects. The city had the privilege of having the jury instructed as to what they should be guided by in making up their verdict, and we do not see how it could have been injured by the rulings of the Court on this question.

The fourth and fifth bills of exceptions relate to the mode of proving the market value of the property assessed for benefits. It is denied by the city that prices received at particular sales for lots of ground in the neighborhood of land, being valued by the jury are admissible in evidence. In a case of this kind the evidence should be directed (*a*) to the proof of the market value in the present condition of the property, and then (*b*) to how much will the present market value be increased by opening the street. The difficulty generally presented is how to determine the market value. The authorities on this subject are by no means uniform.

It is generally conceded that the opinions of witnesses having sufficient knowledge on the subject and acquainted with the land in question, are admissible to prove such value; and that the question as to whether a witness is qualified to give an opinion must be left, in a large measure, to the discretion and judgment of the trial Court, but of course that discretion is not without limit. If such a witness be produced, the weight of his testimony must depend largely upon the reasons he assigns for his opinion. If he be unable to give some intelligent reasons for his opinion as to value, a jury will not likely be much influenced by it. If he knows of recent sales of similar properties, unaffected by a condition of affairs peculiar to them, the prices realized at such sales would almost necessarily influence his judgment; and if called upon to give his reasons for naming the value of property fixed by him, the first one likely to be assigned by him is that such other properties brought certain prices. We all know, from observation, if not from

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experience, that if inquiry is made as to the value of a lot on a certain street in a city or town where other sales have been recently made, it is generally answered by naming the prices realized at such sales. If twelve jurors are taken upon land to ascertain its value, with which they are unacquainted, the first question that is suggested to them is, "What does land in this neighborhood sell for?" As was said in *Moale v. Mayor, etc., of Baltimore*, 5 Md. 324, "with a view to get at this (the value of the lot), the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned." The property sold may, owing to peculiar circumstances, have brought more or less than the real market value, but those circumstances can be explained, and if it is similar in character, location, etc., and the sale was of a sufficiently recent date and was not made under unusual conditions, the price realized would help a jury to reach a just and proper conclusion. They are not required to adopt a price fixed by other sales, but they consider it in connection with their own view of the land and the other evidence in the case. We think, therefore, that the prices realized at sales of the land in question and of similar land in its vicinity, made within a reasonable period of time theretofore, being voluntary and not forced sales, are admissible in evidence, either on direct or cross-examination of witnesses conversant with the facts. This view is sustained by *Moale's case*, *supra*; *Pierce on Railroads*, 224; *Lewis on Eminent Domain*, sect. 443, &c.; *Wyman's case*, 13 Metc. 316; *Paine v. Boston*, 4 Allen, 168; *Sawyer v. Boston*, 144 Mass. 470; *Provision Co. v. Chicago*, 111 Ill. 651; *Cherokee v. S. C. Co.*, 52 Iowa, 279; *March v. P. & C. R. R. Co.*, 19 N. H. 372; *Washburn v. M. & L. W. R. R. Co.*, 59 Wis. 364; *Randolph on the Law of Eminent Domain*, sec. 236, and other authorities that might be cited. As the evidence objected to was admissible, under the principles above announced, there was no error in the Court's rulings in the fourth and fifth exceptions.

Our views expressed on the second and third bills of exceptions avoid the necessity of discussing the sixth.

In regard to the testimony of Patrick Reddington, presented by the seventh exception, there may be some question whether the Court ought to have permitted him to testify in chief as to what rate he did the grading on the Union Railroad. He may have made special arrangements with the company, and it did not necessarily follow that, because he did the work at a certain price, it was a fair or the usual price for grading. But, as his answer corresponded with the prices established by all the witnesses who testified on that subject, the appellant could not have been injured by that portion of his evidence.

The company offered two prayers, which were granted, and the city three, the first and second of which were granted and the third rejected. The first prayer of the company and the third of the city present the same question raised by the first bill of exceptions and require no further comment. The second of the company instructed the jury that the burden of proof rests upon the Mayor and City Council of Baltimore to show to the satisfaction of the jury the extent of the increase of the market value of the lots of said property owner binding on Madison street, as the result of the opening of said street. We think this prayer was unobjectionable. The burden was on the city to establish the benefits this property was to be charged with. It certainly could not be said that the burden was cast on the company to prove that it was not benefited as much as the city claimed it was. There is no presumption of law in these cases that the assessment of the Commissioners is correct, but under the very terms of the ordinance the jury is "to ascertain and decide on the amount of damages or benefits," and in this case, as we have already decided, was confined to the amount of benefits.

No authority has been cited, and we think none can be found to require the Court to permit the book of the proceedings for the opening of Madison street to be taken by

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the jury to their room on the motion of the city. The refusal of the Court to do this is the subject of the ninth and last exception.

We have thus considered all the bills of exceptions in the record. Some points that were argued we might have discussed more at length, but we have given them all careful consideration and are of the opinion that the rulings of the Court below must be affirmed.

*Rulings affirmed with costs to the appellee.*

(Decided February 28th, 1895.)

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THE FIRST NATIONAL BANK OF GRAFTON,  
WEST VIRGINIA, *vs.* THE BUCKHANNON BANK  
OF WEST VIRGINIA.

*Diligence in Presenting Checks for Payment—Discharge of Drawer  
—Collecting Agent—Substituted Check.*

When the banker on whom a check is drawn subsequently becomes insolvent, the want of due diligence by the payee of the check, or his collecting agent, in presenting the same for payment, does not discharge the drawer when it is shown that the latter was not injured by the delay, and that if due diligence had been used the check would not have been paid.

If a check be drawn on a bank situated in another place, it should, at the latest, be mailed for presentment on the day after it is received, and should be presented at the place of payment on the day after it arrives there.

The defendant bank gave to the plaintiff bank, in West Virginia, a check on N. & Sons, bankers in Baltimore, with whom defendant had a deposit. Plaintiff received the check on January 12, and on the same day mailed it for collection to a bank in Philadelphia, which received it on January 13, and forwarded it for collection to a Baltimore bank, by which it was received on January 14. At one o'clock on that day the check was presented to N. & Sons for pay-



ment. They drew a check on the Western Bank in settlement and received the check drawn on them. Thirty minutes afterwards N. & Sons suspended business and closed their doors. Their check was afterwards presented for payment to the Western Bank, on the same afternoon, during banking hours, and payment was refused. Had the plaintiff's check been presented to N. & Sons on January 13, or before noon on January 14, it would have been paid, but at the time they gave their check on the Western Bank they had no funds there and the check was of no value, and they themselves could not then pay plaintiff's check on them. *Held*,

- 1st. That since the plaintiff was under no obligation to forward the check on N. & Sons until the day after its receipt, viz., January 13, the fact that it was sent through Philadelphia did not cause it to reach Baltimore later than plaintiff was bound to have it there.
- 2nd. That since the plaintiff bank had, through its collecting agent, until the close of business on January 15, to present the check for payment, it was guilty of no negligence in not presenting it prior to noon on January 14.
- 3rd. That since N. & Sons were unable to pay the check when it was presented, the surrender thereof and acceptance of the substituted check caused no injury to the defendant, and, as the substituted check was valueless, the mere failure to present it for payment within thirty minutes likewise produced no injury to the defendant.

Appeal from the Baltimore City Court. This was an attachment against a non-resident sued out by the appellant against the appellee, and laid in the hands of the Continental National Bank. The voucher was a running account of debits and credits showing a balance due to the appellant of \$1,024.75. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Frank Woods* for the appellant, cited: 2 *Daniel Neg. Instr.*, secs. 1592, 1595, 1598, 1625; *Story on Prom. Notes*, sec. 493; *Tiedeman on Com. Paper*, sec. 445; *Burkhalter v. Bank*, 42 N. Y. 538; *1st Nat. Bank v. 4th Nat. Bank*, 77 N. Y. 320; *Johnson v. Bank of N. A.*, 5 Robertson (N. Y.) 554; *Smith v. Miller*, 6 Robertson, 157.

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*Edward Duffy* (with whom were *Nicholas P. Bond* and *H. J. Jewett, Jr.*, on the brief), for the appellee, cited: *Anderson v. Gill*, 79 Md.; *Ward v. Smith*, 7 Wall. 45; *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *Stevens v. Park*, 73 Ill. 387; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Sweet v. Titus*, 4 Hun. (N. Y.) 638; *Heartt v. Rhodes*, 66 Ill. 351; *Taylor v. Wilson*, 11 Metcalf, 51; *Haines, etc. v. Pearce*, 41 Md. 221; *Morse on Banks and Banking*, 3d Ed. sec. 247; *Haslett v. Commercial Bank*, 132 Pa. St. 125; *Bullard v. Randall*, 1 Gray, 605; *Minot v. Russ*, 156 Mass. 459; *Smith v. Miller*, 43 N. Y. 171; *Ibid.*, 52 N. Y. 545; *Daniel on Negot. Inst.*, sec. 1601; *Bank v. Samuel*, 20 Fed. Rep. 664; *Minot v. Russ*, 156 Mass. 460; *Smith v. Miller*, 43 N. Y. 174; *Haslett v. Com. Bank*, 132 Pa. St. 125; *Metropolitan Nat. Bank of Chicago v. Jones*, 137 Ill. 634; *Born v. First Nat. Bank of Indianapolis*, 123 Ind. 78; *First Nat. Bank v. Leach*, 52 N. Y. 350; *Thomson v. Bank*, 82 N. Y. 1; *Girard Bank v. Bank of Penn.*, 39 Pa. St. 92; *Freund v. Importers, etc., Bank*, 76 N. Y. 352; *1st Nat. Bank v. 4th Nat. Bank*, 6 Hun. 335.

McSHERRY, J., delivered the opinion of the Court.

The case of *Anderson v. Gill, Extr.*, 79 Md., is clearly distinguishable from the one now before us. In *Anderson v. Gill, Extr.*, we held that when the payee of a check drawn on a banker having funds of the drawer available to cash it, presents it in due time through his collecting agent, and the latter, instead of receiving money for it, surrenders it and takes in lieu of the money the drawee's own check upon another bank having funds with which to pay the substituted check, and then fails to use proper diligence in presenting the substituted check for payment, which, when it is presented, is not paid, because of the supervening insolvency and suspension of the drawer of the substituted check, the loss must fall, as between the drawer and payee of the original check, upon the latter and not upon the former. It is not necessary to repeat the reasons, or again refer to the

adjudged cases upon which the conclusion reached in that case was founded. It is obvious that if the payee's own negligence in not presenting the substituted check in a reasonable time before the suspension of its drawer has been the direct cause of its non-payment, or, stating it differently, if the substituted check was drawn upon a bank having funds of its drawer, and if it would have been paid, had due and proper diligence been used in presenting it, and after the expiration of the time beyond which its presentment would not be within the limits of due diligence, the drawer of it suspends and the substituted check is in consequence not paid; this negligence of the payee of the original check in not presenting the substituted check at a time when it would have been paid, cannot be visited upon the drawer of the original check and he will be discharged. But this doctrine cannot apply where the facts fail to show that the drawer of the original check has been injured by the delay or the want of due diligence of the payee or his collecting agent. If the drawer of the original check has not been injured by the conduct of the payee, he is in no worse position in consequence of that conduct, than if due diligence had been used by the payee without securing payment; and if the facts show that the exercise of due diligence in making presentment of the substituted check would have been useless, because of the insolvency of the drawer thereof, and because the drawer thereof was without funds to meet it, then the failure to use such diligence could not prejudice the rights of the drawer of the original check; provided the drawee thereof was insolvent when it was drawn, and was unable to cash it when presented. Assuming always that the original check would have been paid in cash, had cash been demanded and insisted on when it was presented; and assuming also that the exercise of due diligence would have secured the payment of the substituted check, then the failure to exert that diligence, whereby loss occurs, would result in an injury to the drawer of the original check and would discharge him. But injury can-

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not be predicated of the want of due diligence unless, but for the want of such diligence, the money would have been paid. Until it is shown that the use of due diligence by the payee or his agent would have resulted in the payment of the substituted check, the first step has not been taken towards establishing injurious negligence on his part.

Now, in the case at bar, the Buckhannon Bank of West Virginia, being indebted to the First National Bank of Grafton, West Virginia, and having a deposit with J. J. Nicholson & Sons, of Baltimore, an amount greater than this debt, gave to the Grafton Bank a check on Nicholson & Sons for the amount of the indebtedness due to the Grafton Bank. This check was dated January the eleventh, 1892, and was on the same day mailed to the Grafton Bank, and was received by it on the succeeding day. On that day, the twelfth, the Grafton Bank endorsed the check for collection for its account and forwarded it by mail to its correspondent, the Manufacturers' National Bank of Philadelphia. On the thirteenth, the Manufacturers' Bank received it and at once sent it by mail to its correspondent, the National Farmers' and Planters' Bank of Baltimore, for collection. On the next day, the fourteenth, the last named bank received it, and at *one o'clock* presented it, together with other checks and drafts, at the counter of J. J. Nicholson & Sons for payment. Payment was not made in cash, but instead thereof, upon the surrender of these checks and drafts, Nicholson & Sons drew their own check on the Western National Bank of Baltimore for the total amount of this and the other checks and drafts, and delivered it to the messenger of the National Farmers' and Planters' Bank. In *thirty minutes* afterwards Nicholson & Sons, having suspended, and being hopelessly insolvent, closed their doors. When the check of Nicholson & Sons to the National Farmers' and Planters' Bank was shortly afterwards, but on the same afternoon, and during banking hours, presented to the Western National Bank, payment was refused. Demand was immediately made for the return by the Nicholsons of the surrendered

checks, but admittance to their banking house was not obtained until next day, when the check drawn by the Buckhannon Bank was protested and then recovered by an action of replevin. It is admitted by the agreed statement of facts that had the check held by the Grafton Bank been presented to Nicholson & Sons at any time on the *thirteenth* or *up to noon* on the fourteenth, it would have been paid by them; and it is further admitted that Nicholson & Sons had no funds to their credit with the Western National Bank, but, on the contrary, were largely indebted to that bank on account of overdrafts when they drew their check in favor of the National Farmers' and Planters' Bank at one o'clock on the fourteenth of January. It is also distinctly admitted that this check "was in fact of no value."

We are now asked, in the light of these facts, to say that the receipt by the National Farmers' and Planters' Bank of this worthless check and the failure to present it within *thirty minutes* thereafter, though it is not shown that it would have been paid had it been presented within that time, has resulted in such an injury to the Buckhannon Bank, as to discharge the latter's liability to the Grafton Bank; and this, too, though the Nicholsons were utterly unable, by reason of their hopeless insolvency, to pay in cash the check drawn on them by the Buckhannon Bank when it was presented at one o'clock the same day. That is the appellee's contention, and so the Court below decided. The position is absolutely untenable.

The Grafton Bank having received, on January the twelfth, the check drawn on Nicholson & Sons, was bound to present it for payment in a reasonable time. There being no dispute about the facts, what constituted a reasonable time is a question of law for the Court. Whilst it is undisputed that if the check be drawn on a bank located in the place where the check is delivered, the holder has until the close of business hours of the next secular day to present it, it is equally the settled law that if the check be drawn on a bank situated in another place, it should, at the

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latest, be mailed for presentment on the day after it is received, and should be presented at the place of payment on the day after it reaches there. 3 *Rand. Com. Paper*, sec. 1106; *Byles on Bills*, 14, 164; *Chitty on Bills* (13 Am. Ed.) 383; *Rickford v. Ridge*, 3 Camp. 537. In the pending case, as already stated, the check was received by the Grafton Bank on January the twelfth, and was mailed, not the next day, but the same day, to its Philadelphia correspondent for collection, and was received in Baltimore on the fourteenth, and was on that day presented for payment. Though the record contains the admission that if the check had been mailed in Grafton on the twelfth, to Baltimore *direct*, it would, in the due course of the mail, have reached the latter place on the morning of the thirteenth; still the Grafton Bank was under no obligation to mail it for collection until the day *after* it was received by it, that is, until the thirteenth; and had it forwarded it on that day by mail direct to Baltimore, the check would not have been received there until the *fourteenth*, the day it was in fact received. The forwarding of it through Philadelphia did not, therefore, cause it to reach Baltimore later than the Grafton Bank was bound to have it there for presentment. As, under the rule above stated, the Grafton Bank had, through its collecting agent, until the close of business hours on the fifteenth to present the check for payment, it was obviously guilty of no negligence in not presenting it prior to *noon* of the fourteenth, up to which time, according to the agreed statement of facts, it would have been paid. But the check having been presented an hour later, when confessedly the Nicholsons were unable to pay it over their own counter, and the National Farmers' and Planters' Bank having taken, upon the surrender of this worthless check, an equally worthless one drawn by Nicholson & Sons on a bank in which they had no funds, but to which they were already heavily indebted on overdrafts, no injury was in fact done to the Buckhannon Bank unless it was made to appear that the Western National Bank would have paid Nicholson & Sons'

check within the thirty minutes following its receipt by the National Farmers' and Planters' Bank, even though the drawers of that check had no funds to their credit when they drew it. We can not assume that the Western National Bank would have paid this check if it had been presented prior to the actual suspension of the Nicholsons; and as there is nothing in the record to show that it would have been paid, there is nothing to indicate that the failure to make the presentment worked any injury to the Buckhannon Bank at all. As the Nicholsons, according to the conceded facts, were utterly unable to pay the check drawn on them by the Buckhannon Bank when it was presented at their counter, the surrender of the check and the acceptance of the substituted check of itself caused no injury to the Buckhannon Bank; and as, according to the admitted facts, the substituted check was, when drawn, utterly valueless, the mere failure to present it within *thirty minutes* produced no injury to the Buckhannon Bank. Neither, therefore, the acceptance of the substituted check, nor the failure for thirty minutes to present it, placed the Buckhannon Bank in a worse position than it occupied at the moment its check was presented to Nicholson & Sons for payment; and that presentment was, in fact, made earlier than under the law it was necessary to make it. Consequently, no act done by the Grafton Bank, or by its agents, caused any injury to the Buckhannon Bank. In the *Anderson case* just the opposite facts were presented, and, of course, the opposite conclusion was reached. In that case it appeared that the check drawn by Anderson on Nicholson & Sons would have been paid in cash when presented, had cash been demanded; and further, that the substituted check on the Western National Bank would have been paid had due diligence been used in presenting it. It was shown that two other checks, drawn by Nicholson & Sons on the Western National Bank *after* they had drawn and delivered the one given in exchange for the Anderson check, were presented and paid. Had the same diligence been used by the holder of the

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check given in substitution for the Anderson check that the holders of these two other checks exerted, *that* check would also have been paid. The failure to use that degree of diligence, under the circumstances, therefore resulted in injuring Anderson, and he was held to be discharged. It follows, from what has been said, that the judgment of the Court below was erroneous, and it will be reversed that judgment may be entered for plaintiff.

*Judgment reversed and cause remanded  
with costs above and below.*

(Decided February 28th, 1895.)

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JOHN J. SHANFELTER, TRADING AS C. DUFFY & CO.  
*vs.* THE MAYOR AND CITY COUNCIL OF BAL-  
TIMORE.

*Delay in Condemnation Proceedings—Liability of Municipality—  
Proof of City Ordinances.*

The Court does not take judicial notice of municipal ordinances, and in a declaration relying on them, they should be more particularly referred to than by number and date.

Ordinances of the city of Baltimore directed that a certain square should be acquired as a site for a new Court House. Plaintiff was the lessee of a hotel occupying part of the site, and all the interests in the square were purchased or condemned by the city, except the plaintiff's. No condemnation proceedings had been instituted when plaintiff sued the city to recover damages alleged to have been caused to his business by the delay in acquiring his property. The delay complained of was from May 1, 1893, when a Building Committee was appointed by ordinance, to April 7, 1894, when the suit was instituted. The Building Committee had no power to condemn until after they had failed to agree upon a price with the land owners, and there was no allegation that they had acted in bad faith. *Held*, that the passage of the ordinances was not a commencement of condemnation proceedings, and that the plaintiff had no right of action against the municipality on account of the delay to institute such proceedings.



Appeal from the Baltimore City Court. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Richard S. Culbreth*, for the appellant.

The property owner is entitled to recover damages caused by any unreasonable delay, either to prosecute or abandon condemnation proceedings, because holding the condemnation over the property inflicts loss and injury. *Black's case*, 56 Md. 339, and 50 Md. 241; *Norris' case*, 44 Md. 598. If such be the reason, what difference in principle can there be whether condemnation is so held by virtue of an ordinance which declares that a definite piece of property shall be taken for public use, or of a petition to the Court, praying that it may be so taken. There is the same publicity in both cases. The same uncertainty hangs over the property as to the question of the owner's tenure. His conduct in regard to the property is under the same restraint, and the waiting game is played with the same disaster to the victim. In the case of private corporations, which have the right of eminent domain, the commencement of proceedings is often the first intimation of their intention to condemn certain property for their use. Under such circumstances it would be difficult to conceive of a case where any damage could arise until the proceedings had been commenced. But where, as in the case before the Court, a public ordinance contains a declaration that specified property shall be taken, from the moment of its passage, all the evils exist, so far as the owner is concerned, as in the case where proceedings have been, in fact, begun. The passage of such an ordinance is really the commencement of the proceeding. Had the ordinance been silent as to the particular property to be taken, a different case would be presented. In the case before the Court, a peculiar hardship lies in the fact that a hotel, such as the Imperial Hotel, is usually a land-

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Argument of Counsel.

mark in the city in which it is located. It has a history. The moment the announcement is made that it is to be torn down, that history is published not only in the local papers but in the papers of cities in other States, because of the interest which guests in all sections of the country naturally have in it, and of the information which it conveys to travelers that they can no longer procure accommodations.

Condemnation proceedings are intended to be summary and expeditious. *New Central Coal Co. v. Iron Co.*, 37 Md. 565; *Leisee's case*, 2 Md. App. Rep. 110.

*Thomas G. Hayes, City Counsellor, and William S. Bryan, Jr., City Solicitor, for the appellee.*

The declaration is had on demurrer, because the ordinances relied on are not given in substance or legal import. *Central Savings Bank v. Baltimore*, 71 Md. 523; *Hanover Ins. Co. v. Brown*, 77 Md. 74.

The Building Committee, as public servants, had under the ordinances a discretion as to the time of commencing the condemnation proceedings, which discretion was to be controlled by the public interests and not by the wishes of the appellant. There is no legal duty imposed on the Building Committee by the ordinance, due and owing to the appellant, a breach of which would render the appellee liable in damages to the appellant.

The market value of his property, which is paid the appellant when the property is taken, includes its whole value as it exists at the time of taking, but does not include good will, as of a hotel or the like. Delays in commencing the condemnation proceedings can in no possible way cause any diminution of this value. *Baltimore v. Rice*, 73 Md. 307; *Moale's case*, 5 Md. 314, 322; *Musgrave's case*, 48 Md. 290.

The delays which give the owner a right of action are the unreasonable delays which occur after the commencement of the condemnation proceedings, but not delays in commencing such proceedings. It is undoubted law that if, after condemnation proceedings have been completed,

there is an unreasonable delay on the part of the city authorities, after protest from the property holders, in determining whether they will accept the land for a public use or not, or in payment for the same, the property holder is entitled to recover such damages as he has actually suffered by reason thereof. *Norris' case*, 44 Md. 607; *Graff's case*, 10 Md. 544; *Musgrave's case*, 48 Md. 272; *Lake Roland Elevated R. R. v. Baltimore*, 77 Md. 372; 2 *Poe on Pleading and Practice*, sec. 784.

It has also been held that where there is an unreasonable delay in prosecuting a condemnation for opening a street *already commenced*, after notice and remonstrance from a property holder, he can recover his actual damages suffered thereby. *Black's case*, 50 Md. 242; *Idem*, 56 Md. 333. But in all the cases, so far as we are aware, in order to give a cause of action, the work of condemnation must have been commenced; there must have been some overt act affecting the property holder's land. In stating the limitations of the rule, JUDGE DILLON, in his work on Municipal Corporations (vol. 2, sec. 609), speaks of the cause of action arising from "wrongful and injurious acts of the corporation *in the course of the proceedings*."

BOYD, J., delivered the opinion of the Court.

This appeal is from a judgment of the Baltimore City Court sustaining a demurrer of the appellee, the defendant below, to the declaration. The appellant, who was the plaintiff below, alleges that he is the lessee "for a long term of years" of a property known as the Imperial Hotel, on the square bounded by Calvert, St. Paul, Fayette and Lexington streets, in the city of Baltimore, which square had been selected by the city authorities, under certain ordinances passed in pursuance of an Act of the General Assembly of Maryland, for the erection of a new Court House, and that, although all interests, except the plaintiff's, in said square, had been obtained for the purposes mentioned in the

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Act of Assembly and in the ordinances, the Building Committee of the new Court House "neglected, delayed and failed to complete the purchase or condemnation of his interest in said property, from the first day of May, 1893, to the time of the institution of the suit, although repeatedly requested and warned so to do." He avers that he has been greatly damaged, injured, obstructed and prejudiced in his business as hotel keeper, by reason of the delay, in the use and enjoyment of his property.

The claim intended to be presented by the declaration is the right to recover damages for what is alleged to be an unreasonable delay in acquiring plaintiff's property after the passage of the ordinances selecting as a site for the new Court House the square which includes the said hotel property, notwithstanding the requests and warnings of the plaintiff. It is contended, however, on the part of the city, that the declaration is technically defective in not setting out at least the legal import of the ordinances, upon which appellant bases his right to recover. They are only referred to by number and dates, and not even the substance of them is given. The Court cannot take judicial notice of their contents, and hence it is not informed by the declaration what duties are imposed or powers conferred by them. Without the provisions of the ordinances, on which the plaintiff relies, being before the Court, it is impossible for it to determine whether they impose such duties on the defendant or render it liable for failure to perform them. We do not think, therefore, that the references to said ordinances are sufficient to comply with the well-established rules of pleading adopted in this State.

But, as we would have the power to remand the case so that the declaration could be amended to meet our views, as to mere matter of form, which we need not state more fully, we will determine the main question intended to be presented, as it has been fully argued, and the ordinances have been, for the purpose of the argument, treated as if before us.

The appellee, having been authorized by an Act of Assembly, passed Ordinance No. 100, approved October 7th, 1892, by which the Commissioners of Finance were authorized and directed to issue bonds of the city to the amount of six million dollars, from time to time, as the same might be required for the purposes therein mentioned. One million seven hundred and fifty thousand dollars, or so much thereof as might be required of the proceeds of the sales of said bonds, were directed to be used for the purchase of ground, erecting thereon and properly furnishing a new Court House and Record Office. By Ordinance No. 81, approved April the 20th, 1893, the square above mentioned was selected as the site, and the Mayor, Comptroller and Register were directed to acquire title to a portion of the property, included within the bounds of the square, on which John F. Carter held an option, for the sum of one hundred and thirty-two thousand five hundred dollars, to be paid out of the one million seven hundred and fifty thousand dollars. Ordinance No. 83, approved April 20th, 1893, authorized the Building Committee of the new Court House (to be thereafter appointed) in case it could not agree with the owner or owners of any lot or portion of this square, or any interest therein, or if the owners were under age, etc., to condemn the same, and then minutely prescribed the course of proceeding in the event of condemnation. The second section of that ordinance limited the total amount to be expended by the Building Committee to one million six hundred and seventeen thousand and five hundred dollars, to be paid out of the sum appropriated for the new Court House, and directed the Commissioners of Finance to sell from time to time, as the same were needed, as many of said bonds as should be required to supply the said sum. Ordinance No. 108, approved May the 1st, 1893, named the Building Committee of the new Court House and authorized them to advertise in Baltimore and other cities, inviting the submission of drawings, plans and specifications. Ordinance No. 187, approved May the 25th,

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1893, further defined the duties and powers of the Building Committee. It authorized them to employ a competent architect, gave them power to provide for the erection of the new Court House upon the site already selected, when it shall have been acquired, and to do all acts and make all contracts essential in their judgment to the best and most successful accomplishment and carrying out of the design of building the new Court House, provided that the full amount expended for all purposes should not exceed one million six hundred and seventeen thousand and five hundred dollars, which sum it will be observed is the difference between the total amount appropriated and the amount paid for the property held under the John F. Carter option.

The above are all the ordinances referred to in the declaration and cited in argument, and hence we need not refer to any others. It is apparent from an examination of them, that it was contemplated to erect a large and expensive building. Considerable time was necessarily required to perfect the plans for the building, and the only money at the command of the Building Committee must be raised by the Commissioners of Finance from sales of the bonds authorized for the purpose. The members of the committee were only named in the ordinance approved the first day of May, 1893. The delay complained of by the plaintiff was from that date until a day not later than the 7th day of April, 1894, at which time the declaration was filed, although the record does not disclose whether the suit was instituted then or prior to that time. If the passage of the ordinances, selecting the site, appointing the committee, etc., gave the plaintiff a cause of action, as contended by him, unless executed without any unreasonable delay, it would seem to be a rather severe construction of what is to be deemed unreasonable to require the committee at the peril of rendering the city liable for damages, to acquire all the property necessary and perform all the other labor incident to the early part of their work within eleven months from their appointment.

But we cannot assent to the doctrine sought to be established by the plaintiff, that the mere passage of these ordinances, without any execution of them so far as the plaintiff is concerned, gives him a right of action. It may be true that the selection, as a site for the new Court House, of the square, which includes the property in which the plaintiff has an interest, may make his tenure uncertain and may possibly affect his business to some extent, but if that be conceded we do not think it follows that under the circumstances of this case the city is liable to him merely because it has not proceeded to acquire his interest. The determination on the part of the city authorities to adopt that particular site, is not a taking of the plaintiff's property, nor is it even a declaration of their intention to take it *in invitum*, as long as he holds it. The Building Committee has no authority under these ordinances to condemn it without first making a proper effort to agree with him. It may be that his term will expire before the property is needed, or negotiations for a purchase, if fairly conducted on both sides, may result in an agreement, and save the necessity of condemnation.

However this may be, passing the ordinances cited cannot properly be deemed a beginning of condemnation proceedings, and no such proceedings can be instituted until some attempt to agree is made. That is a condition precedent to the exercise of the right of eminent domain by the Building Committee, as Ordinance No. 83 only gives them the power to condemn in case they cannot agree with the owners, excepting those laboring under some disability, non-residents and unknown heirs. We think it clear, therefore, that it cannot properly be said that these ordinances were the commencement of condemnation proceedings, but they only vest the power to condemn in the Building Committee and prescribe their mode of procedure. As well might it be said, that a charter of a railroad company authorizing it to construct a road between two given points, and vesting it with the the power of eminent domain,

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is to be treated as a commencement of such proceedings, because it authorizes the company to adopt them.

It is claimed, however, on the part of the appellant, that the case of *Mayor, etc., of Baltimore v. Black*, 56 Md. 333, which had been previously in this Court, as reported in 50th Md. 235, establishes the doctrine contended for by him. It may be true that the language of the learned Judge who delivered the opinion of the Court, both in 50th Md. and 56th Md., may give some ground for that contention, if the facts of the case be not borne in mind. But the statement of facts in the opinion reported in 50th Md. shows that an ordinance had been passed on the 10th day of June, 1871, to condemn and open Presstman street from Gilmor to Monroe street, and on the 12th day of the same month the Commissioners for Opening Streets gave notice, as required by the City Code (1869), of their intention to meet on July the 12th, and proceed to execute the ordinance. The Blacks owned land lying between Gilmor and Monroe streets, which would be divided by Presstman street, and claimed compensation for the whole of two lots of ground, a part of which was required for the bed of the street. They then surrendered the two lots to the city, and the Street Commissioners sold the parts thereof not included in the bed of the proposed street, under the provisions of the City Code. No further action was taken in the premises until the 20th day of May, 1875, when the ordinance of June the 10th, 1871, was repealed and the proposed improvement abandoned. It was very properly held, under those circumstances, that an action would lie for damages caused by the unreasonable and unauthorized delay, provided some steps had been taken to put the city in default, such as remonstrances, complaints or applications by the owners to the city authorities to proceed with the work or repeal the ordinance. In point of fact, the proceedings had not only been commenced, but nothing remained to be done but to pay the damages or abandon the work. Although it is held that the city can abandon such improvements, even after



the assessment of damages, yet, if an owner of property has been injured by an unauthorized delay and the city has been made aware that he is not satisfied to let his title to the property remain in that unsettled condition, he is not without remedy. So, although it is said in that opinion that when an ordinance for condemning and opening a street has been passed, and remains unexecuted or but partially carried into effect, the property owner cannot maintain an action for such alleged negligence on the part of the city, unless he has done something to put it in default, it is apparent that it was not intended to say that if he did take such action, and the ordinance remained *wholly unexecuted as to the particular property in controversy*, it necessarily followed that an action would lie.

But the ordinances now being considered differ materially from the one before the Court in the *Black case*. In the latter the law provided that before the Mayor and City Council should pass any ordinance for the opening of a street, they should give sixty days notice of the application for the passage of such ordinance in two daily newspapers published in the city of Baltimore. Then, when the ordinance was passed; the Street Commissioners (who were annually appointed, as other city officers) were required to give thirty days notice of the object of the ordinance under which they proposed to act, and of the day, hour and place of the first meeting to execute the same. The Commissioners were then required to meet at the time and place named, and proceed to award damages, assess benefits, etc. They were not vested with the power to negotiate with the owners, and in case of failure to agree, then to proceed to condemn, but they at once fixed the damages, subject, of course, to certain rights of appeal, etc. In this case the Building Committee had not even been appointed when the site was determined upon, and, as already stated, their duty relative to the acquisition of the property was to purchase it, if they could, at such price as they deemed just and the appropriation would permit of, and in the event of a failure to

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reach an agreement, they could then proceed to condemn. They are vested with large discretion, which the nature of their duties required. We have thus devoted considerable space to the consideration of Black's case, as the counsel for the appellant earnestly and forcibly contended that it sustained the position taken by him. But if we gave the fullest and broadest meaning to the language there used, without applying and limiting it to the facts of that case, which we must do, we would still be met with the marked difference between an ordinance for opening a street under the provisions of the City Code of 1869 and the ordinances now before us, as above indicated.

Without prolonging this opinion by discussing *Graff's case*, 10 Md. 544, and *Norris' case*, 44 Md. 607, we need only say that the property involved in them had been actually condemned, and they do not in anywise conflict with the views herein expressed by us. On the contrary, they and *Musgrave's case*, 48 Md. 272, sustain the conclusion reached by us.

In *Leisee v. St. Louis and Iron Mountain R. R. Co.*, 2 Mo. App. Rep. 110, so much relied on by the appellant, the company had filed its petition and had commenced condemnation proceedings. The facts of the hypothetical case, therein stated by the learned Judge who delivered that very able opinion, which is quoted in the brief of the appellant, would amount to bad faith on the part of the condemning company. We do not mean to say that an owner of property cannot under any circumstances have relief unless the company or municipality has actually commenced condemnation proceedings. It may be possible that a case might occur, which would show such a deliberate effort and determination to depreciate the value of property for the purpose of subsequently acquiring it by condemnation at a reduced and insufficient price, as to render the company or municipality liable on the ground of fraud. If such case is ever presented, it will be time enough to determine how far relief can be given, but in this case it is not alleged or

intimated that the members of the Building Committee were not acting in perfectly good faith. We have found no authority which sustains the right of the property owner to recover damages under such circumstances as those before us.

The appellant has not been disturbed in his possession, and if the prospective use of the property for a new Court House has affected him injuriously, it is only of that character of loss that anyone having an interest in property may sustain by reason of the provisions of law, which require all persons to hold their property subject to be taken for public purposes, or by those authorized to exercise the right of eminent domain, for what are deemed to be at least *quasi* public purposes upon the payment or tender of just compensation.

If no ordinance selecting a site had been passed, but the defendant had simply been authorized to erect a new Court House, and the city authorities and the prevailing sentiment of the community favored the use of this square for the purpose, by reason of its central locality and the fact that the city already owned a considerable part of it, the plaintiff might suffer the same character of loss he now complains of, yet it would hardly be contended that the city would in such case be liable to him, however much he may have urged and insisted upon the authorities taking definite and final action. It would be in that as it is in this case, *damnum absque injuria*.

It follows from what we have said that the judgment must be affirmed.

*Judgment affirmed with costs to the appellee.*

(Decided February 28th, 1895.)

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Syllabus.

THE WEST BOUNDARY REAL ESTATE COMPANY  
*vs.* WM. H. BAYLESS AND BEVERLY W. SMITH.

*Specific Performance—Contract to Erect House of Given Cost—Compensation in Lieu of Specific Performance—When Deed not Controlled by Antecedent Contract of Sale.*

When a bill is filed for specific performance, it is only under special circumstances that pecuniary compensation will be decreed in lieu of the relief asked for.

When a deed is executed and accepted in pursuance of a contract to sell land, the presumption is that it is a performance of the entire contract, and that the original agreement becomes null.

The general rule is that parol evidence of antecedent negotiations is not admissible to affect the terms of a deed, except where it is impeached for fraud, accident or mistake, or where the deed is shown to have been only a part execution of the contract.

A contract for the sale of land provided that the vendee should erect, within one year, a dwelling house costing not less than \$4,000, and made provision for other restrictions. The deed, as executed, did not contain this stipulation, but provided that the grantee should not, within ten years from the date of the deed, erect on said lot any dwelling house costing less than \$3,000; and the deed differed in other particulars from the contract of sale. Four months before the expiration of the year referred to in the original agreement, the grantee conveyed the property by an absolute deed to S. Upon a bill for specific performance of the contract and other relief, *Held*, that, assuming the existence of a completed contract, yet, since the deed was inconsistent in important particulars with the contract, it took the place of all antecedent negotiations, and that the plaintiff was not entitled to demand specific performance of the original contract.

Appeal from a decree of the Circuit Court of Baltimore City (DENNIS, J.), sustaining a demurrer to the bill of complaint and dismissing the same without prejudice to the right of the plaintiff to proceed at law.

After negotiations between the plaintiff corporation and the defendant, Bayless, for the sale by the former of the lot

of ground referred to in this case, Mr. F. K. Carey, the president of the plaintiff, on June 16, 1893, wrote to Bayless as follows :

“ I am instructed by the board of directors to accept your proposition for the sale of the lot on the west side of Thirteenth street, Walbrook (here follows the description.) The company does not undertake to open the street in the rear of the lot, and does not even designate it, but it may open a street corresponding to it, and in that event requires that no building shall be erected within thirty feet of your *westernmost* building line. In other respects the lot is sold to you upon the ordinary terms and under the ordinary restrictions, which are contained in the printed deed, of which I enclose you a copy. You are to pay for the property as follows : Twelve hundred dollars in cash. You are to deliver up to the company eighty shares of its capital stock. You agree to erect a dwelling upon the lot costing not less than \$5,000.00, and have it ready for occupancy within one year from 1st July, 1893.”

On the next day Bayless replied: “Your letter of 16th inst. received and contents noted. I accept your proposition as to sale of lot, except that the dwelling is to cost not less than \$4,000.00 instead of \$5,000.00.”

On July 3, 1893, the plaintiff executed a deed to Bayless, which, after reciting the payment of \$5,200, the entire purchase money, and after the grant in fee simple and the *habendum* clause, contained the following provisions :

The mention of streets or alleys are for the purpose of description, and not for the purpose of dedication. Provided, and on the condition, that the said William H. Bayless, his heirs and assigns, shall not, within the period of ten years from the date hereof, do or permit to be done on the lot hereby conveyed, any of the following acts: 1st. Sell or permit to be sold any alcoholic liquor, etc. 2nd. Build any improvements nearer than thirty feet to the front building lines. 3d. Erect any independent privy or stable. 4th. Erect on said lot any dwelling house costing less than \$3,000.00. 5th. Erect any factory or store.

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The grantor company covenants: 1st. To indemnify William H. Bayless from costs or damages for condemnation or opening of streets in Walbrook. 2d. To warrant specially. 3d. To execute further assurances.

On February 19, 1894, Bayless conveyed the lot to the defendant, Smith, by a deed in the usual form, containing no covenants except those of special warranty and further assurance. No dwelling house had been erected on the lot.

On July 12, 1894, the plaintiff filed its bill against Bayless and Smith, alleging that, in pursuance of the contract set forth in the above mentioned letters, the deed to Bayless was executed; that Bayless paid \$1,200 and delivered the shares of stock, but did not build the house; that Bayless sold the land to Smith for the purpose of escaping his obligation to build, but that Smith took the lot with actual notice thereof; that on account of said contract plaintiff sold to Bayless for \$1,270 less than the market value of the lot; and that plaintiff was injured by defendant's breach of contract. The bill prayed:

(1.) That the said deed from the said William H. Bayless to the said Beverly W. Smith may be annulled and set aside by the decree of this Honorable Court. (2.) That the said Beverly W. Smith and William H. Bayless, their heirs and assigns, may be restrained by the order and injunction of this Honorable Court from selling or in any way disposing of the said lot of ground. (3.) That the said agreement between the said William H. Bayless and your orator may be specifically enforced, and that the said William H. Bayless may be decreed to build upon the said lot, in accordance therewith, a house costing not less than \$4,000. (4.) That the said William H. Bayless may be decreed to pay to your orator the sum of \$1,270.00, being the difference between the price paid by him and the market value of the said lot on June 16th, 1893, as liquidated damages for the non-performance by him of his agreement to build a house upon the said lot, and to have it ready for occupancy by July 1st, 1894.

The defendants demurred to the bill, and the plaintiff, declining to amend, appealed from the decree dismissing the bill.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*William H. Buckler* for the appellant.

A contract to erect a definite structure of any kind on land sold to the person who agrees to erect it, where the conveyance of the land is the consideration for the agreement, and where the structure is contributory to the value of adjoining land belonging to the plaintiff, is one which equity will specifically enforce.

This building agreement is one which equity will specifically enforce. The principle on which Courts of Equity have refused to specifically enforce building contracts of the usual kind (*i. e.*, those between a builder and the owner of the land), was established by Lord Kenyon in *Errington v. Aynesly* (2 Brown Ch. 341), and by Lord Thurlow in *Lucas v. Commerford* (3 Brown Ch. 166.) The reason given was that "if one will not build, another may," and that a Court of Equity would not undertake to superintend the construction of a building. In *Fleet v. Brandon* (8 Ves. Jr., 159), where the contract was to fill up a gravel pit, the same rule was applied, on the ground that the plaintiff, who was owner of the land, had an adequate remedy at law. The rule was recognized by Mellish, L. J., in *Wilkinson v. Clements* (L. R. 8 Ch. App. 112), and is well-established in this country. *Story, E. J.*, sections 725, 726; *Beck v. Allison*, 56 N. Y. 368; *Mastin v. Halley*, 61 Mo. 201; *Pomeroy Eq.*, section 1402.

But the rule is subject to the following important exceptions: (1.) Where the defendant has agreed to construct on his own land some definite structure, in which the plaintiff has an interest not susceptible of adequate compensation in damages. (2.) Where the consideration for the

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promised construction is the conveyance of the land on which the structure is to be erected. (3.) Where the structure is essential to the use, or contributory to the value of adjoining land owned by the plaintiff. (4.) Where there has been a part performance, so that the defendant is enjoying the benefits of the contract *in specie*.

In these four classes of cases, equity *will* enforce a building contract, and in the case at bar, every one of these four exceptions is distinctly present. See *Pomeroy Eq. Jur.*, 2d edn., p. 2159, note; *Pomeroy on Specific Performance*, section 23; *Fry on Specific Performance*, 3d edn., sec. 103; *Mr. Justice Miller, in Ross v. U. P. Ry. Co.* (1 Woolworth, 26-41.) A review of the reported cases will show how far the Courts have carried the above rules, even when, as Mr. Fry says (page 46), "the terms of the contract have been general and difficult to execute."

In England the earliest case (1843), is that of *Storer v. G. W. Railway* (2 Y. & C. 48.) The plaintiff had sold to the company a right of way through his pleasure grounds, and the company had agreed to construct *an arched way* under its roadbed large enough for hay-wagons to pass. The Vice-Chancellor said it was competent for the Court to enforce the specific performance of an agreement by the defendant to do defined work on his own property. See also *Price v. Corporation of Penzance*, 4 Hare, 506; *Raphael v. Thames Valley Ry. Co.*, L. R. 2 Ch. App. 147; *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28; *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44; *McManus v. Cooke*, 35 Ch. D. 697; *Hepburn's case*, 50 L. T. 660. The three cases of *S. W. Ry. v. Wythes*, 5 D. M. & G. 880; *Wilson v. N. & B. Junction Ry.*, L. R. 9 Ch. App. 279, and *Brace v. Wahnert*, 25 Beav, 348, are in apparent conflict with the above line of decisions, but may easily be reconciled.

The same rule has been applied in the United States. In *Sturvesant v. N. Y. City*, 11 Paige, 414, where the city had agreed to *plant* and *regulate* Stuyvesant Square, the decree was granted by Chancellor Walworth, who said: "The Cour



has jurisdiction to compel the specific performance by the defendant of a covenant to make certain improvements or erection upon his own land, for the benefit of the complainant." In *Burchett v. Bolling*, 5 Munford, 442, where partners had agreed to build a *tabern* on the land of the plaintiff conveyed by him for that purpose, specific performance was also decreed. In *Ross v. U. P. R. R. Co.*, 1 Woolworth, 26, the late Mr. Justice Miller gave an admirable review of the authorities, and though he refused specific performance, because of the gigantic character of the undertaking, he carefully laid down the distinctions above stated, and recognized the English rule.

In *Lawrence v. Saratoga R. Co.* (36 Hun. 467), the railway company had promised to construct for the plaintiff as a partial consideration, (1.) "*A bridge over the railroad.*" (2.) "*A neat and good bridge at west end of field.*" (3.) "*A neat and tasteful station at or near Excelsior Spring.*" Despite the indefinite nature of these stipulations, which was strongly urged on behalf of the defendants, the New York Supreme Court, in an elaborate opinion, decided to decree specific performance of the entire contract. Again, in the recent case of *Post v. West Shore R. R.* (50 Hun. 301, unanimously affirmed by the Court of Appeals in 123 N. Y. 581), where the covenant in its deed required the building by the railway company of "*a good and convenient crossing,*" a decree for specific performance was declared to be proper. See also *Gregory v. Ingwersen*, 32 N. J. Eq. 199; *Hubbard v. R. R. Co.*, 63 Mo. 68; *Dayton R. R. Co. v. Newton*, 20 Ohio St. 401.

The cases in which specific performance has been refused are distinguishable and do not militate against the soundness of the rule; *e. g.* *Dausforth v. R. R. Co.*, 30 N. J. Eq. 15; *Blanchard v. R. R. Co.*, 31 Mich. 43; *Port Clinton Co. v. R. R. Co.*, 13 Ohio, 544; *Ross v. U. P. R. Co.*, 1 Woolw. 36; *Marble Co. v. Ripley*, 10 Wall. 358; *Kendall v. Frey*, 74 Wis. 29; *Mastin v. Halley*, 61 Mo. 201.

The *ratio decidendi* of the cases above cited, is that spe-

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cific performance is the proper remedy where the plaintiff has parted with the land in consideration of the promised structure, and where the promise, in virtue of which the defendant obtained possession, has been flagrantly broken. These reasons exist here as strongly as in any of the above cases. Is the arm of Equity too short to reach a defendant who wilfully refuses to perform such a contract as the one now before the Court, or too feeble to coerce him?

The contract containing this building agreement is a valid contract. The correspondence between Mr. Bayless and Mr. Carey, set forth in the bill of complaint, when taken together with the assent of Mr. Carey to the modification in the price of the house proposed by Mr. Bayless, constitutes a complete contract. The essence of contract is mutual assent, however expressed. 1 *Addison on Contracts*, Abbott & Wood's notes, 8th ed. p. 15, note.

The contract embodied in the letters of June 16 and 17, 1893, was not merged in the subsequent deed of July 3, 1893. Merger is a question of intention. *Bryant v. Hunting*, 71 Md. 443; *Liuthicum v. Thomas*, 59 Md. 594; *Newbold v. Peabody H. Co.*, 70 Md. 493. The deed is plainly not coextensive with the contract, and therefore cannot have merged it. *Boaler v. Mayor*, 19 C. B. (N. S.) 76; *Kempsey v. Metcalf*, 61 Iowa, 320; *Witbeck v. Waine*, 16 N. Y. 532.

Specific performance should be granted, as being the only proper and adequate remedy. All the details requisite in making out a *prima facie* case for specific performance, are here presented. The case is fully and accurately stated in the bill. *Semmes v. Worthington* (38 Md. 318.) The contract is mutual, fair, certain and reasonable; it has been performed on the part of the plaintiff, and performance is alleged in the bill. *Rider v. Gray* (10 Md. 285.) *Carswell v. Walsh* (70 Md. 507.) In a case of this kind, damages in an action at law offer an uncertain remedy, and it is settled that where damages would be inadequate or their measure uncertain, specific performance is the proper remedy.

*Gottschalk v. Stein*, 69 Md. 56; *Johnson v. Johnson*, 40 Md. 198; *Pratt v. Law*, 9 Cranch. 493.

The deed of February 19th, 1894, from Bayless to Smith, should be rescinded. Though this building agreement might well be specifically enforced against Mr. Smith, being a purchaser with notice (see *Aikin v. R. R. Co.*, 26 Barb. 289, 300), yet the appellant, as already shown, has a right to its enforcement against Mr. Bayless, the original party to the contract. For this purpose the deed of February 19th, 1894, must be rescinded, and this should be done as incidental to the relief of specific performance.

The main reason for rescission is that Smith, by purchasing with full notice of the appellant's equity, was guilty of constructive fraud. This species of fraud is thus defined by *Story*, (Eq. Jur. I, section 395): "Another class of constructive frauds consists of where a person purchases with full notice of the legal or equitable title of other persons to the same property." See also section 397, for Lord Hardwicke's doctrine as to *mala fide* purchasers. Again, the appellant was a creditor of Bayless to the extent of this building agreement, and Smith knew it. *Story* (Eq. Jur. I, section 369), says: "Cases have repeatedly been decided in which persons have given a full and fair price for goods, and where the possession has actually been changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and, therefore, set aside." This has repeatedly been recognized in Maryland. *Stewart v. Inglehart*, 7 G. & J. 135; *Price v. McDonald*, 1 Md. 414; *Winchester v. R. R. Co.*, 4 Md. 239; *Newbold v. Peabody H. Co.*, 70 Md. 493.

Damages for the non-performance of the building agreement should be granted either in addition to, or in substitution for, specific performance. In this State, the granting of compensation *in lieu of* specific performance, where the specific execution of the agreement cannot, for some reason, be decreed, is well established. *Rider v. Gray* (10 Md. 185); *Nelson v. Bank* (27 Md. 76); *Green v. Drummond* (31 Md. 71.)

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Argument of Counsel.

Compensation *in addition to* specific performance has been granted in cases similar to the case at bar. For instance, in *Corpn. of London v. Southgate* (38 L. J. Ch. 141), a contract to accept a lease was specifically enforced, and damages were decreed to be paid by the lessee for the *non-building of the house* within the time stipulated. In *Post v. R. R. Co.*, 50 (Hun. 301), already cited here in support of the first point, not only was the contract to build the crossing enforced, but the Court said (page 305): "It is the practice of Courts of Equity to administer all the relief which the nature of the case demands," and decreed that the railroad company should pay twenty-five hundred dollars damages for its non-performance. See also *Story Eq. Jur.*, secs. 796, 799; *Pomeroy Spec. Perf.*, sec. 474; 5 *Wait's Ac. & Def.*, 831.

Even if specific performance be refused, the deed of July 3rd, 1893, should be rescinded on the ground that the consideration upon which it was given has failed. It is a well-established rule of equity that a deed will be rescinded on the application of the defrauded grantor, where the consideration for the deed has failed, as it has in this instance. *Linthicum v. Thomas*, 59 Md. 574; *Clagett v. Hall*, 9 G. & J. 96; *Benscoter v. Green*, 60 Md. 333; *Holland v. Anderson*, 38 Mo. 55.

\**Edwin G. Baetjer*, for the appellees.

FOWLER, J., delivered the opinion of the Court.

We announced at the conclusion of the opening argument of the appellant's counsel in this case that it was our opinion that the order sustaining the demurrer to the plaintiff's bill should be affirmed, and some of the grounds on which that opinion was based were then briefly expressed by the Chief Justice. Counsel for appellant at once filed a motion for reargument, which is based upon the case of

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\*The Court declined to hear counsel for the appellees.

*Busey v. McCurley*, 61 Md. 436, which was not cited either in the briefs or oral argument, and he contends that by the decision in the case cited it has been in effect adjudicated :

“*First*.—That a contract to erect a dwelling of a given cost is sufficiently definite to support a bill for specific performance.

“*Second*.—That if the defendant had parted with the title to the land upon which the dwelling is to be erected, the Court will grant compensation to the plaintiff in lieu of specific performance.”

A careful examination of that case will show, however, that it does not support the contention of the appellant. The contract sought to be specifically enforced in the case now before us, is to erect on a certain lot a dwelling house costing not less than four thousand dollars. In the case relied on, the bill was filed to enforce a stipulation in an ante-nuptial contract, by which James McCurley, the testator of the appellants in that case, agreed that his wife, if she should survive him, should receive, at his death, from his estate, “one dwelling house, to be vested in her absolutely, in lieu of dower,” and in consideration therefor she resigned her dower and distributive share in his estate. It appears that the husband left an estate valued at about one hundred thousand dollars, and by his will he disposed of the whole of it, and bequeathed a small leasehold dwelling house, worth two thousand dollars, to his wife, in discharge of his agreement with her. She renounced this bequest and claimed a certain dwelling on West Baltimore street, which she alleged was built for her and was designed to come to her in the event of her surviving her husband. This dwelling house, however, had been devised to one of the testator’s daughters by a former wife. The case stated in the bill, therefore, was simply this : That the husband had agreed to make provision for a dwelling house for his wife by will ; that he had built and designed a particular house on Baltimore street, in Baltimore City, for her, and that he had not only failed to devise to her the house designated,

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but that the bequest he made to her was simply illusory, and was made with a studied design of depriving her of what was really intended originally she should have. It was shown by the proof that the husband did in fact select the particular house mentioned in the bill, as the one intended for his wife, and that it was worth about \$6,000. Under these circumstances the Court said, "there certainly ought to be a remedy for the grievance suffered by the widow, if the case stated in the bill be clearly made out." And notwithstanding the fact that the dwelling house she was to have had been *clearly designated, as shown by the proof*, it was held that specific performance of the contract would be attended with no little difficulty, *and that as there had been no special objection taken to the jurisdiction of the Court to grant relief by way of compensation*, that was perhaps the most just and equitable mode of administering relief *under the peculiar circumstances of the case*.

The English cases cited in *Busey, Ex., v. McCurley, supra*, cannot, we think, be fairly relied on to support the contention of the appellant in this case. They and many others do fully support the general proposition announced in 61 Md.: "That a Court of Equity has jurisdiction, upon application for specific performance, to decree the assignment of a particular house, or the erection or purchase of a house, to gratify the requirements of the contract sought to be specifically performed." The Court, however, is careful to limit this general statement of the rule, and proceeded to say: "But in all such cases the agreement must be sufficiently definite to guide the Court in the direction to be given for specific performance, or, at any rate, that it may be made certain and definite upon proper inquiry." And it must be remembered that in the case relied on the Court had the case not only of a house of the value of six thousand dollars, but it had the additional fact that the very house designated by the husband himself was a certain house on Baltimore street, in Baltimore City. What was indefinite and uncertain in the contract was made definite

and certain by proper inquiry, that is to say, by the evidence in the cause. But as the case in hand now stands we have nothing but the general and indefinite language of the contract, nor has it been suggested that there is any proper inquiry we could resort to make that contract so definite and certain that it may be specifically executed by a Court of Equity.

Although in *Busey's case*, *supra*, relief was granted by way of compensation, because of the peculiar circumstances of that case, and also because no special objection was taken to the jurisdiction of the Court so to do, yet, at the same time, the rule was clearly laid down that the power to grant compensatory relief will not be exercised in all cases for specific performance. "That power, as a general rule, exists only as *ancillary or incidental to the power to grant other relief*." Under Act of Parliament, 21 and 22 Victoria, chapter 27 (Lord Cairn's Act), section 2, it is provided that "in all cases in which a Court of Chancery in England has jurisdiction \* \* \* for specific performance, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for \* \* \* such specific performance; and such damages shall be assessed in such manner as the Court shall direct." Our rule, however, is, as laid down in *Busey's case*, 61 Md. 448, that in cases of specific performance it is only "under special circumstances, and upon peculiar equities, as for instance in cases of fraud, or where the party has disabled himself by matters *ex post facto* from a specific performance; or where there is no adequate remedy at law that the Court award pecuniary compensation in lieu of other relief."

In deference to the earnest and able argument, oral and written, submitted on the part of the appellant, we have thus considered some of the questions presented other than the one we shall now proceed to discuss briefly, and which, in our opinion, is conclusive of the whole matter. Subsequent to the correspondence between the plaintiff and the

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said defendant, Bayless, which constitutes the contract here sought to be enforced, a deed for the lot in question was executed by the former to the latter, and the question is whether the previous parol contract is or is not merged in the subsequent deed.

The general proposition is well settled that parol evidence cannot be "used either at law or in equity for the purpose of contradicting, adding to, subtracting from or varying the terms of a deed, or controlling its legal operation and effect, except where it is impeached for fraud, or where it is sought to be reformed upon the allegation of fraud, accident or mistake." *Bladen v. Wells*, 30 Md. 581. It is true there is another exception, as for instance, where it clearly appears that it was the intention that the deed was only a part of the execution of the contract. See *Newbold v. Peabody H. Co.*, 70 Md. 499, where it was expressly stipulated in the agreement that the restrictions and reservations contained in the contract should be complied with and carried out *as if embodied in the deed*. In *Bryant v. Hunting*, 71 Md. 443, the general doctrine is thus announced: "The *prima facie* presumption of law arising from the acceptance of a deed is that it is an execution of the whole contract, and the rights and remedies of the parties in relation to such contract are to be determined by such deed, and the original agreement becomes null and void." The case of *Linthicum v. Thomas*, 59 Md. 574, cited by the appellant, has, we think, no application here. That was an appeal from a decree setting aside a deed and contract for exchange of property on the ground of fraud.

Is the case before us an exception to the general rule, and can the contract and the deed stand together? It appears that on the 16th of June, 1893, the president of the appellant wrote to the defendant, Bayless, that he had been instructed by his company "to accept the proposition of Bayless for the sale of the lot in question." Then followed a stipulation in regard to the opening of a street and the putting of improvements nearer than thirty feet from the



westernmost or rear boundary of the lot ; and the letter continues : " In other respects the lot is sold to you upon the ordinary terms and under ordinary restrictions which are contained in the printed deed, of which I enclose you a copy. You are to pay for the property as follows : \$1,200 cash. You are to deliver up to the company 80 shares of its capital stock. You agree to erect a dwelling upon the lot costing not less than \$5,000, and have it ready for occupancy within one year from 1 July, 1893." On the next day Mr. Bayless replied as follows : " Your letter of the 16 inst. received and contents noted. I accept your proposition as to sale of lot, except that the dwelling is to cost not less than \$4,000 instead of \$5,000."

This was the end of the correspondence, and it may be doubted whether there was ever a completed contract formed. But assuming that it was a completed and valid contract, what was the effect upon it of the subsequent deed, which was executed on the 3rd of July, 1893, by the plaintiff to the defendant, Bayless, conveying the same lot described in the contract? The consideration set forth in the deed is \$5,200, and it also provided that the grantee, his heirs and assigns, should not, within ten years from the date of said deed, erect on said lot any dwelling house costing less than *three thousand dollars*, and within the same time he should not build any improvements nearer than thirty feet to the front building line. It is impossible, we think, looking at these two instruments, to suppose they were intended to stand together. The consideration in the contract is \$1,200 cash and 80 shares of the capital stock of the appellant corporation, while the consideration in the deed is \$5,260. The contract provides that no improvements shall, within ten years, be erected nearer than thirty feet to the *rear* building line ; the deed provides that none within the same time shall be erected nearer than thirty feet to the *front* building line ; and, finally, the deed provides that the grantee, &c., shall not, within ten years, erect on said lot a dwelling costing less than \$3,000, while the agreement declares that he shall, before the first of July,

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1894, erect on said lot a dwelling costing not less than four thousand dollars. It would seem, therefore, that the contract, as understood and alleged by the appellant, is entirely inconsistent with the deed in several important particulars. We find nothing which clearly shows that the deed was only a part execution of the contract; but, on the contrary, it appears very clear that it was the intention of the parties, so far as we can ascertain that intention from the alleged contract and the deed, that the latter was to take the place of all antecedent negotiations, and it follows that even if a valid contract had been made, it became, after the execution of the deed, void and of no further effect. As was said by the late JUDGE MILLER, in delivering the opinion of this Court in *Bladen v. Wells, supra*, "if a party after conveying by deed \* \* \* can set up an antecedent or accompanying parol contract contradicting the deed \* \* \* there would be very little room for the operation of the rule and very little security or safety in such instruments or in titles held under them."

• *Decree affirmed.*

(Decided February 28th, 1895.)

THE BALTIMORE AND EASTERN SHORE RAIL-  
ROAD COMPANY *vs.* PRESTON B. SPRING.*Taxation for a Private Purpose—Constitutional Law—Injunction by Taxpayer.*

An Act of the Legislature, the effect of which is simply to levy a tax on the citizens of a certain county to pay certain residents of that county the debts due them by an insolvent railroad company, is unconstitutional, because it involves taxation for a private purpose.

Counties have no inherent power of taxation, and the Legislature can only delegate to them the power to tax for public purposes.

The Act of 1892, ch. 295, authorized the Commissioners of Talbot County to issue bonds to the amount of \$25,000, "to pay a subscription" of the county to the B. & E. S. R. Co.; and provided that the proceeds of the sale of the bonds should be first applied to the payment of the claims of the citizens of Talbot County against said company. This Act was confirmed by the Act of 1894, ch. 152. At the time of the passage of the Act of 1892, Talbot County had not in fact made any subscription, either to the stock or to the bonds of the company, and the railroad had then been completed, but was insolvent and in the hands of a receiver. *Held*, that the Act was unconstitutional, and that an injunction should be issued restraining the County Commissioners from issuing the bonds.

Appeal from an order of the Circuit Court for Talbot County (STUMP, J.) The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*John Prentiss Poe*, Attorney-General (with whom was *Joseph B. Seth* on the brief), for the appellant.

*Thomas B. Mackall* and *Wm. H. Adkins*, for the appellee.

The Act of 1892, chapter 295, approved by the Act of 1894, chapter 152, is unconstitutional and void. It is an attempt to authorize the County Commissioners of Talbot County to issue bonds involving the taxation of all the

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Argument of Counsel.

taxable property of the county, in order to raise money to pay certain favored creditors of the Baltimore and Eastern Shore Railroad Company—in other words, to authorize taxation for private purposes. The right of the Legislature to authorize municipal corporations to aid railroad companies, subject to the provisions of the Constitution of Maryland, is not denied. The purpose of the Act in question, however, is not to authorize Talbot County to aid a railroad company. At the time of the passing of said Act of 1892, chapter 295, the Baltimore and Eastern Shore Railroad Company had been completed and was in operation and was insolvent and in the hands of a receiver. No possible benefit could accrue to the people of Talbot County from the expenditure of their money as provided in the Act of 1892. Not one additional rail or tie could be laid by reason thereof, or one car added to the rolling stock of the company. The entire proceeds of the bonds would go to the private beneficiaries who have procured the passage of the Act.

The fact that the professed purpose of the Act of 1892, chapter 295, is to provide for the payment of a subscription to a railroad company, does not change its real purpose as disclosed by a consideration of all its terms. It is an old device of those seeking illicit legislative favors to attempt to procure the enactment of unconstitutional or otherwise illegal measures under the cover of misleading phraseology, or in the shape of provisos and conditions. Such legislation will not bear the test of judicial investigation. Courts, in construing a statute, look to all the terms to find the true meaning and intent of the Legislature, and if the real and controlling purpose of an Act is found in a proviso, and that purpose is illegal, the whole Act will be declared void. *Brooks v. Hydor*, 76 Mich. 272; 42 N. W. Reporter, 1122; *Mayor and City Council of Balto. v. Gill*, 31 Md. at page 387.

The Constitution provides for two classes of taxation: 1. For the support of the Government. 2. With a political view for the good government and benefit of the community. *Declaration of Rights*, Art. 15; see *Moale v. Mayor*, 5 Md.

314, 320; *Gould v. Mayor*, 59 Md. 378, 380; *O'Neal v. Md. Bridge Co.*, 18 Md. 1, 23; *Mayor v. Greenmount Cemetery*, 7 Md. 517. The second clause of Article 15, Declaration of Rights, is an enlargement, and the only permissible enlargement, of the power to tax. *Wells et al. v. Hyattsville*, 77 Md. at page 141. No taxation is constitutional which cannot be brought within one or the other of these provisions of the Constitution. To tax a citizen for private purposes is to take his property without due process of law, and is, therefore, a violation of the Federal as well as of the State Constitution. *Declaration of Rights*, Art. 23; *14th Amendment, Constitution of U. S.*

Whether the use, in any particular case, be public or private, is a judicial question; for otherwise the constitutional restraint would be utterly nugatory, and the Legislature could make any use public by simply declaring it to be so, and hence its will and discretion would become supreme, however arbitrarily and tyrannically it might be exercised. *New Central Coal Company v. George's Creek Coal and Iron Co.*, 37 Md. 460; *Van Witsen et al. v. Gutman*, 79 Md. It is true that the last mentioned constitutional provision has regard more particularly to the right of eminent domain, which is distinct from the right to tax. But so far as concerns the use or purpose for which the right may be exercised or authorized by the State, the same rule governs both cases. The use must be public.

In *Cole v. La Grange*, 113 U. S. page 1, the Court say: "The general grant of legislative power in the constitution of a State does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property without the owners' consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes." See also *Parkersburg v. Brown*, 96 U. S., 16 Otto, page 489; *County Commissioners of Talbot Co. v. Co. Commrs. of Queen Anne's Co.*, 50 Md. pp. 258, 259 and 260; *Van*

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*Witsen v. Gutman*, Court of Appeals of Md., June 20, 1894, 29 Atl. Rep. 608; *Lowell v. Boston*, 111 Mass. 454 (15 Amer. Rep. 45), 1873; *Mead v. Inhabitants of Acton*, 1 N. E. Rep. at page 413; *Clee et al. v. Sanders et al.* (Mich.) 42 N. W. Rep. page 154; *Allen v. Inhabitants of Jay*, 60 Maine, 124 (11 Am. Rep. 185), 1872; *Feldman v. Charleston*, 23 S. C. 57 (55 Am. Rep. 6), 1884; *State of Kansas v. Township of Osawkee*, 14 Kansas, 419 (19 Am. Rep. 99), (1875); *Citizens', &c., Assn. v. Topeka City*, 20 Wall. 655; *Thorndike v. Camden*, 82 Maine, 39, and 19 Atlantic Rep. 95 (1889); *Dillon, Municipal Corporations*, sections 159, 508 and 736; *Kingman v. Brockton*, 153 Mass. 255 (1891); 26 N. E. Rep. 498.

The power conferred upon a municipal corporation to impose a burthen upon taxpayers in aid of a railroad company is in derogation of the common law, and when granted must be clearly conferred and strictly pursued. No presumptions are made in favor of such legislation. *Mayor, &c., Balto. v. Gill*, 31 Md. at page 395; *St. Mary's Industrial School v. Brown*, 45 Md. 332; *Balto. and Drum Point R. R. Co. v. Pumphrey*, 74 Md., at page 93.

The Act of 1892, chapter 295, is a violation of the 14th Amendment of the Constitution of the United States. In *Ulman v. Mayor, &c., of Baltimore*, 72 Md. p. 592, it is said: "Due process of law is not confined to judicial proceedings. The Article (XIV) of the Constitution (of the United States) is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the Legislature free to make any process due process of law, by its mere will and pleasure."

PAGE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Talbot County, directing a writ of injunction to be issued restraining the County Commissioners of that county from issuing the bonds mentioned in chapter 295 of the Acts of

the General Assembly of 1892, and in chapter 152 of the Acts of 1894. The bill was filed by a taxpayer and citizen of Talbot County, on behalf of himself and other citizens and taxpayers of that county. It is alleged that these "Acts are unconstitutional, and for other reasons invalid, null and void."

Such of the facts appearing by the record, as are requisite to be stated for the purposes of this opinion, may be thus briefly set forth. The Baltimore and Eastern Shore Railroad Co. was incorporated by the General Assembly in the year 1886, for the purpose of constructing and operating a railroad through Talbot and other counties of the State of Maryland. At the same session, by chapter 509, the Commissioners of Talbot County were authorized to endorse the bonds of the Railroad Company to an amount not exceeding \$50,000, after it had been sanctioned by the voters of Talbot County; such bonds were to be secured by a mortgage which should be second to a mortgage to the city of Baltimore. This Act, which authorized only an endorsement of bonds, and not a subscription to the stock of the railroad, though voted upon favorably by the voters of Talbot County at the general election of 1887, it is conceded became inoperative for the purpose of authorizing the proposed endorsement, for reasons not necessary to be now stated. By the Act of 1890, ch. 150, the County Commissioners of Talbot County were authorized to subscribe to the capital stock of the company to the amount of \$25,000. This Act, however, was not published as required by Article 3, sec. 54 of the Constitution, and for that reason became invalid. Soon after its incorporation in 1886, the railroad company proceeded to construct its road, and having fully completed it, operated it until the 21st of April, 1891, when, having become totally insolvent, its property rights and franchises passed into the hands of a receiver, appointed by the Circuit Court of the United States for the District of Maryland; and since that date, under the decree of that Court, all of its property and franchises have been sold to other parties. So

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that in 1892, when the Act of 1892, ch. 295, which will be subject of our examination, was passed, the road was entirely constructed, and after having been operated for a short time, had experienced all the results of insolvency, up to the point of having its affairs administered by a receiver for the benefit of its creditors.

From this recital it is clear that, prior to 1892, there had never been any valid power conferred upon the County Commissioners either to endorse the bonds of the company or subscribe to its stock; nor is it pretended that they ever undertook to exercise such power. In the agreement of parties, found in the record, it is stated that the Commissioners "never passed any resolution to endorse the bonds \* \* or to subscribe to the stock." The statement, therefore, contained in the preamble of the Act of 1892, ch. 295, also in the body of the Act (and also in the Act of 1894, ch. 152), to the effect that the authority to issue bonds was conferred for the purpose of raising money to "pay the county's subscription" to the capital stock of the railroad company, was wholly unfounded in fact. The County Commissioners never did (and never had the power to) make such subscription. There is no question in this case, therefore, of good faith on the part of the county, no contractual element to embarrass the Court in determining the strictly legal effect of the Act of 1892, ch. 295, and the confirmatory Act of 1894, ch. 152.

What, then, are the provisions of these Acts? By the first section of the Act of 1892, the Commissioners are authorized to issue the bonds of the county to the amount of \$25,000; by the second, it is provided that they "shall sell said bonds," and with the proceeds thereof pay said subscription of said county to said railroad company; provided, however, that before any bonds shall be issued under this Act, the said railroad company "shall file, in the office of the County Commissioners of Talbot County, an agreement, in writing, authorizing the said County Commissioners of Talbot County to first pay and satisfy *all proper and legal*



claims and demands held by *bona fide* residents of Talbot County, on the twentieth day of April, in the year 1891, against said railroad company, out of the proceeds arising from the sale of said bonds, and the balance, if any, to apply under the order and direction of Joseph B. Seth, the president of said railroad company." If the claims thus provided for should prove to be in excess of the \$25,000, it is enacted by the third section that they shall be paid *pro rata*, and the receipt of persons holding such claims, and of the president of the company, in the event of any balance remaining after the payment of the claims, shall be good against the railroad and all others claiming under it; and by the fourth section, a "committee" of three are appointed "with full power and authority" to determine the amount of each claim and who are entitled to be paid, and their decision is to be final and without appeal.

To comprehend these provisions thoroughly, it must be borne in mind that the railroad company, at the date of the passage of the Act, had fully constructed its road. It had also become insolvent, and on the day after the date mentioned in the Act, that is, on the 21st of April, 1894, it had passed into the hands of a receiver. No doubt it had many creditors. In Talbot County there were claims exceeding in the aggregate the entire amount of the proposed subscription, and the record shows there was a bonded debt of \$1,600,000, secured by a mortgage upon all the property of the company. Subsequent events have shown that its insolvency was hopeless; such as could only terminate as it did—in a sale for the benefit of its mortgage creditors. Under these circumstances it was plain there was little probability that these creditors in Talbot County, unsecured as they were, could ever hope to have their claims paid in the ordinary way. Now, as was said by this Court in *M. & C. C. of Balto. v. Gill*, 31 Md. 387, "we must not forget that we are dealing with the substance, not with form. It is the thing done or sought to be accomplished which must determine the question of the power." The purpose of this

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Act was not to aid in the construction of the road, because the road was then completed, nor even to pay debts incurred in the construction, for the beneficiaries of the Act were all those who, being residents of Talbot County, held "proper and legal claims" against the company, and this included all claims, whether incurred by the company in constructing the road or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith, was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and scope of the act is simply to levy a tax upon the property of the citizens of Talbot County, to pay to certain residents of that county the claims due to them by an insolvent railroad company. This is a private purpose, and not one of the objects of taxation. By the Declaration of Rights, Art 15, as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. "Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes." *Cooley Cont. Lim.* 479. If it be necessary to cite authorities to maintain this thoroughly established principle, the following may be mentioned: *Citizens' Savings and Loan Ass. v. Topeka City*, 20 Wall. 655; *Cole v. La Grange*, 113 U. S. 1; *Cooley Cont. Lim.*, sec. 488, and authorities there cited; *Lowell v. Boston*, 111 Mass. 454. *Sharpless v. Mayor, &c.*, 21 Penn. St. 168; *Brodhead v. Milwaukee*, 19 Wis. 652; *St. Mary's Ind. School v. Brown*, 45 Md. 335.

Nor can this Act be supported under the 54th sec. of Article 3. The object of this section was not to extend the power of taxation. It is, in fact, "a limitation of power, not only of the local authority, but of legislative power itself." *Pumphrey's case*, 74 Md. 111. Counties have "no inherent power of taxation." What power of taxation they exercise must be delegated to them by the Legislature. The Legislature, however, cannot delegate a power prohib-

ited by the Constitution. Therefore, the taxing power, when exercised by the county authorities, as was said by this Court in the case of *Daly v. Morgan*, 69 Md. 468, "is but the exercise of the taxing power of the Legislature delegated to them, and is subject to every constitutional limitation to which the taxing power of the Legislature is subject." *St. Mary's Ind. School, &c., v. Brown*, 45 Md. 333.

Being of the opinion that the object and effect of this Act is not to subserve a public purpose, but to pay certain individuals by taxing the property of the people of Talbot County for their benefit, we must pronounce the Act itself unconstitutional and void.

Inasmuch as what we have said disposes of the case, we deem it unnecessary to consider the other questions raised at the argument.

*Order affirmed.*

(Decided February 28th, 1895.)

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JOHN F. LANGHAMMER AND RICHARD A. DUNN  
*vs.* JOHN MUNTER AND OTHERS, OFFICERS OF REGIS-  
TRATION, AND JAS. BOND, CLERK, &c.

*Residence of Voters—Effect of Registration—Constitution, Article 1,  
Section 1.*

The entries made by a Register of Voters concerning the qualifications of a voter, are the findings of an officer charged with the duty of ascertaining their correctness, and they should not be disturbed until their falsity is established by evidence.

It is not necessary, under Constitution, Art. 1, sec. 1, that a voter should have the same fixed house of residence for the prescribed period of six months; it is sufficient if he resides anywhere, or in any number of places, within the voting district for the required time.

Temporary absence from one's home, with a continuous intention to return, will not deprive one of his residence.

Md.]

Argument of Counsel.

Upon a petition to strike from the registry list the name of a certain voter, registered as having lived for four years in a certain ward, the evidence showed that his name was not upon the police census of voters; that he did not live at the particular house given as his residence, but had occasionally slept there and had received the permission of the occupier of the house, who had known him for years, to register therefrom; that a *subpoena* for him had been returned *non est*, and that he was a seafaring man. *Held*, that the evidence was not sufficient to authorize the Court to strike his name from the list of voters.

Appeal from an order of the Court of Common Pleas (PHELPS, J.) The appellants, voters of the first ward of Baltimore City, filed a petition in said Court against the Officers of Registration of the fifth precinct of that ward, and Jas. Bond, Clerk, &c., alleging that James Bosley and Charles Williams, who had been registered in that precinct at the September sitting, 1894, were not duly qualified voters of the precinct, and were not entitled to be registered therein, and they prayed the Court to strike the names of Bosley and Williams from the registries of said precinct. The evidence is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Charles J. Bonaparte* (with whom was *John C. Rose* on the brief), for the appellants.

The question to be determined upon this appeal is whether, upon the evidence in this case, the alleged voters, Bosley and Williams, resided in the fifth precinct of the first ward of Baltimore City at the time they registered therein. If the names in question were not those of men who at the time they registered, resided in the first precinct of the first ward, those names had no right upon the registries of the precinct, and the order appealed from is erroneous, and should be reversed.

There has been much discussion as to what constitutes residence within the meaning of the constitutional provisions common to all of the States, making residence one of

the qualifications to be possessed by all persons seeking to exercise the right of suffrage. It is true that the principles underlying all the decisions are in substance the same, but the infinite variety of facts, and of combination of facts with which the Courts have had to deal, have frequently made the application of those principles very difficult. Under no definition of residence, however, which has ever been given by lexicographers, text writers or Courts, is it possible to contend that the alleged voters in question had any residence in the fifth precinct of the first ward.

A man's legal residence is his true home or permanent abode, to which, as such, whenever he is absent, he intends to return. *Paine on Elections*, secs. 46, 42; 2 Kent Com. 431; *Roosevelt v. Kellogg*, 20 Johns. 208; 8 Wend. 140; *Long v. Ryan*, 30 Gratt. 720; *Johnson v. People*, 94 Ill. 505; *Matter of Collins*, 64 How. Pr. 65; *Lambe v. Smythe*, 15 M. & W. 433; *Dale v. Irwin*, 78 Ill. 182; *Opinion of the Judges*, 5 Metc. 588; *Fry's Election case*, 71 Pa. St. 302; *Sprague v. Houghton*, 3 Scammon, 377; *French v. Lighty*, 9 Ind. 477.

Accepting the definition of this Court in *Shaeffer v. Gilbert*, 73 Md. 70, which is the definition of all other Courts, that a man's residence, as the word residence is used in constitutional and statutory provisions conferring the right of suffrage and regulating its exercise, means a man's home, can it be seriously contended that these alleged voters had any home in the residence of the person who allowed them to sleep for two nights in his kitchen? That house was certainly not their home. Its occupant would have been the last man to admit that they had any home with him, and if they had not a home there, they did not reside there, and if they did not reside there, they had no right to register from there or vote from there. *The Constitution of Md.*, Art. 1, sec. 1; *Kemp et al. v. Owens*, 76 Md. 238.

It may be argued here, as it was argued below, that these men had as much of a residence at the place from which they registered as they had anywhere else. If this were

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Argument of Counsel.

true, it would be entirely irrelevant. The Constitution of this State does not confer the right of suffrage upon every adult male citizen of the United States who may seek to exercise it. In addition to sex, age and citizenship, it requires residence. The man who has not the residence prescribed by the Constitution, is no more entitled to vote than is an alien, a minor or a woman. In point of fact, however, it is not, and can not be true, that the house from which they registered comes as near being their residence as any other place. Every man has had a residence at some period of his life. That residence remains his legal residence until he has acquired another. *Thorndyke v. The City of Boston*, Metc. 242, 245; *McCrary on Elections*, sec. 71; *French v. Lighty*, 9 Ind. 478; *Paine on Elections*, sec. 45; *Muffet v. Hill*, 22 Northeastern, 322. In Illinois it has been decided that transient persons acquire no residence in the State. *Behrensmeyer v. Kreitz*, 26 Northeastern, 712; 135 Ill. 591. In the same State it was decided that a man who sometimes pensioned himself upon a friend in one town, and sometimes upon relatives in another town, and sometimes with different persons living in the district in which he claimed to vote, had no residence in it, and no right to vote therein. *Shepherd v. Allen*, 17 Northeastern, 756.

In this case the evidence leaves no room to doubt that the men whose right to register is in controversy, slept at this house for the purpose, and the mere purpose, of registering from it. This appears clearly from the fact that they asked the owner of the house whether he had any objection to their registering from it. They slept in his house in August; a month later, when in the city to register, if in fact they were the men who registered, they did not go to his house, thereby showing in still another way that they did not regard it as their home. In other words, the question here presented is, whether a man can select his voting precinct, and establish his right to vote there, by the simple expedient of sleeping one or two nights in that precinct for the very purpose and for the purpose alone, of qualifying himself to vote therein?

*Peter J. Campbell and James H. Preston* (with whom were *Wm. S. Bryan, Jr.*, and *Edward D. Fitzgerald* on the brief), for the appellees.

The undisputed evidence sustaining the qualifications required by the Constitution, is that the applicants, Bosley and Williams, were each born in Baltimore City; that they were, respectively, 25 and 22 years of age; that they had resided in the city (State), respectively, 25 and 22 years; in the ward, respectively, 4 years and 2 years, and in the precinct, each 2 years. This is proof fulfilling all the demands of the franchise, subject to the requirements of the Constitution. The single offer of evidence to contradict this was that the police census does not show the names of Bosley and Williams, and that No. 2225 Essex street cannot be their residence, because Mr. Eisenreich had allowed them to sleep but two nights in his kitchen, though on two former occasions they had in a like manner slept in his house for a night or two. There is no evidence or suggestion that their residence was at any other place, and that the applicants for registration were actually registered in any other place, the only witness for the applicants testifying that he thought that they had no permanent house, and if they had, he did not know where it was. As a matter of fact, these watermen or oystermen, from their circumstances and the nature of their calling, had no other home than their sleeping place, from which to register.

It will be seen that there is nothing in the law requiring accuracy as to the number of the house or any particularization in indicating the exact spot of residence, it being sufficient if the uncontroverted proof is that the applicant is a resident of the precinct, ward, district and State, and there is no power of the registers or Courts allowing registers to strike names of registered applicants on account of any inaccuracy, if any inaccuracy there is, in giving the exact location of applicants' place of domicile. If it be admitted that they never lived at No. 2225 Essex street, and never were there, it would be improper to strike their

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names from the list in the absence of proof that they were not at that time residents of the ward and precinct as sworn to by them in their application.

PAGE, J., delivered the opinion of the Court.

This is an appeal from an order of the Court of Common Pleas of Baltimore City, dismissing the petition of the appellants praying that the names of James Bosley and Charles Williams be stricken from the registry of voters of the fifth precinct of the first ward of Baltimore City.

At the hearing the petitioners produced the registry of voters of the precinct and ward, and read in evidence so much of the contents thereof as related to the registration of the persons alleged by the petition to be improperly registered. The appellants' counsel, however, contend that these entries can only be used for the purpose of showing what the appeal is from, and are not evidence to be regarded by the Judge in determining whether the register has acted properly. We cannot adopt this view. The duty of a register of voters under our statute is not merely ministerial. It is his duty to interrogate the party applying for registration under oath, touching his right to register; and if, after this primary examination of the applicant, and of such other evidence \* \* as may be immediately accessible, he is in doubt, he may adjourn his determination to a subsequent day, when he must proceed to determine whether the applicant is a qualified voter or disqualified. He is thus compelled to take evidence, weigh its force and effect, and finally to "determine;" and it is from this determination that anyone who thinks himself aggrieved may appeal to one of the Judges of the Supreme Bench of Baltimore City (if the election precinct is in Baltimore City.) The appeal is by petition, and with it shall be filed certified copies of all the entries in the registry of voters relating to the subject-matter, and if, in the opinion of the Judge, the petition and exhibits show a *prima facie* cause of complaint, he orders the proceedings provided by the Act. After answer is made and



evidence adduced, the Court is required to consider, in making up its determination, the petition (which includes the entries), the answers and such testimony, for or against the petition, as may be offered, and from the whole case thus made up, decide whether the party is or is not a qualified voter. These entries are not only the sworn statements of the applicant, but also the deliberate findings of an officer charged with the public duty of determining their correctness, and as such should not be disturbed until their falsity has been established by sufficient evidence.

Adopting this principle in the case we are now considering, what does the proof establish? There is no evidence assailing such entries as show that James Bosley is white, twenty-five years of age, and has resided in Baltimore City twenty-five years, and in the ward four years. There is no sufficient evidence to controvert the entry with respect to his residence (the nature of which, as proven, will be hereinafter examined) in the precinct. The proof that his name does not appear upon the police census of registered voters, is too uncertain to be entitled to much weight. The fact that Bosley was a sea-faring man, might fully account for his absence at the time the census was taken; even if it be assumed that the police performed their work with perfect accuracy. It was proved by the testimony of Charles A. Eisenreich, that he resided at 2225 Essex street (the place Bosley had stated as his residence in the ward and precinct); that neither of the alleged voters had ever lived there, but that he knew them, and, in the month of August, 1894, had permitted them, at their request, to sleep for two nights in his kitchen; that they had asked him to permit them to register from his house, and he had replied that he did not object, if it was not contrary to law; that the alleged voters were two young men who "followed the water," and he supposed they were then down the bay dredging. He did not know whether they had any permanent home; thought they had not, and if they had, he did not know where it was. He had known

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them for some years, and on one or two previous occasions they had, in like manner, slept at his house for a night or two at a time, but never longer. It was also shown that *subpoenas* had been issued for each of the parties, and returned by the sheriff *non est*. This is a full statement of all the evidence in the cause. We have stated it particularly with reference to James Bosley, but what has been said is equally applicable to the case of Charles Williams.

Under these circumstances the appellant contends that neither of these men is a qualified voter and entitled to be registered. This depends on the meaning of the word "residence," as used in the first section of Article 1 of the Constitution, when applied to the particular proof in this case. What constitutes "residence" within the meaning of this section and Article of the Constitution, has frequently been the subject of judicial decision, in this State and elsewhere. It has often been held to be equivalent to the word "home," in the sense of a house, to which one, whenever absent, intends to return. It undoubtedly carries with it an element of permanence, differing, however, widely in special cases. "The word 'home' suggests relations differing in breadth and strength, though not in kind, when applied on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and on the other hand to the clergyman whose home may change in two years, or to the railroad laborer whose home may change in two months." *Paine on Elections*, 46; *Chase v. Miller*, 41 Penn. St. 204; *Lincoln v. Hapgood*, 11 Mass. 350; *Story on Conflict of Laws*, sec. 43. "Temporary absence, with a continuous intention to return, will not deprive one of his residence, though it extend through a series of years," *Cooley Const. Lim.* 600; *Fry's Election case*, 71 Penn. St. 302; nor will a sojourn, however prolonged, with the purpose of returning, be sufficient to acquire a residence. There must be the act of abiding, without the intention of removing therefrom. *Story on Conflict of Laws*, sec. 41, *et seq.* In other words, there must be, to constitute residence, an "actual home in the sense of

having *no other home* whether he intends to reside there permanently, or for a definite or indefinite length of time." *Shaeffer v. Gilbert*, 73 Md. 71. Residence, therefore, is a question depending upon fact and intention, and if so, it may be applicable to a particular spot, or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a resident of that country or locality. Home, domicile or residence, may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county or a State. *Dacey on the Law of Domicile*, page 55, *et seq.* "It is obvious that \* \* \* State residence and the district residence are of the same nature, and whatever is necessary to constitute the one, is essential to define the other." *Fry's Election case*, 71 Pa. St. 306.

The framers of our Constitution have in the 1st section of Article I clearly recognized these applications of the word residence. That section prescribes as the qualification of a voter, that he shall be a resident of the State for one year, and a resident of the district six months. There is no requirement that the proposed voter shall have some particular spot, which he calls his home; provided he makes his home (in the sense of having no other home), anywhere, or in however many places, for the required times, within the limits of the State and the voting district. Probably it was borne in mind that numbers of citizens, through misfortune or otherwise, were without dwelling places, but there is no evidence to be found in any part of the Constitution that these were to be denied the privilege of the elective franchise. On the contrary, it seems to have been the purpose to confer the right of suffrage upon every male citizen who has attained the age of twenty-one years, only requiring, for wise reasons, that every such person

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shall have resided in the State one year, and in the voting district six months. When the General Assembly came to provide by law for a uniform registration of voters, as required by the fifth section of Article 1st of the Constitution, it was careful to prescribe such regulations as should prevent abuse and fraud in the exercise of this great privilege. The city of Baltimore having been divided into small precincts, officers of registration are provided for each, and large powers are given them effectively to discharge the duties imposed upon them. For the purpose of clearly identifying the person applying to be registered, the officers of registration are to ascertain his name, color, age, place of birth, place of residence by street and number (if any), the time of his residence in the city and ward, and enter the same in the proper column of books prepared by the State and furnished them for that purpose. Fraudulent conduct on the part of the registers, or of other persons in or about the registration of voters, is made a misdemeanor, punishable on conviction with heavy penalties. And in addition to all this, if any person, whether he be the person applying to be registered or any other person, shall think himself aggrieved by the action of the Officer of Registration, there is given the right of appeal to a Judge of the Supreme Bench. If these safeguards should prove ineffectual to prevent the fraudulent practices which the counsel for the appellant seems to apprehend, it will be for the Legislature to devise and enact other provisions to accomplish the most desirable object of securing absolutely pure elections. But whatever may be done, no restrictions can be imposed that will require other or different qualifications for voting, than those prescribed by the first Article of the Constitution of the State.

*Order affirmed.*

(Decided February 28, 1895.)

MARY L. PEARSON AND OTHERS, *vs.* CHARLES A.  
WARTMAN AND OTHERS.

*Devise and Legacy—Charging Legacies on Land.*

Under wills executed before the Act of 1894, ch. 438, the personal estate is the primary fund for the payment of legacies, and they are never charged upon the real estate unless such appears to have been the intention of the testator.

The mere fact that the testator gives a legacy to one person, and then gives the rest and residue of his estate to another, does not show an intention to charge the legacy on the real estate.

In a will executed before 1894, the testator, after giving a life-estate in all his property to his wife, gave upon its termination certain pecuniary legacies and then devised to other parties "the remaining portion of my estate." The personal estate was insufficient to pay the legacies. *Held*, that the legacies could not be charged on the land.

Appeal from the Circuit Court of Baltimore City. Charles Hoffman, by his will, probated in Baltimore City in 1875, devised as follows:

"I give and bequeath to my beloved wife, Anna Hoffman, all my real and personal estate, wherever situated, to be held by her for her sole and separate use for and during the period of her natural life, with full power and authority to her, my dear wife, to collect the rents, issues, incomes and profits of the same and apply the same to her sole and separate use, with full power and authority, to my executors hereinafter named, to sell and dispose of, at any time hereafter, any part or the whole of a tract of land containing forty-one acres of land, more or less, situated near the York Road, five miles from the city of Baltimore, and the proceeds arising therefrom to be invested for the same uses and purposes as are above expressed."

After the death of the life-tenant, the will gave certain specific devises and bequests, and also a number of pecuniary legacies, and then disposed of the residue of the estate as follows:

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Argument of Counsel.

"I give, devise and bequeath the remaining portion of my estate: First, to Alfred Bennett, two shares; to Mary Jane Hay, of the town of York, Pa., one share; to Maria, the wife of Doctr. Danl. P. Hoffman, one share; to Charles A. Wartman, one share; to Mrs. Eliza Rhodes, my niece, one share; to my sister, Louisa C. Jones, one share. The shares to be alike and of equal value."

Anna Hoffman, the life-tenant of the estate, having departed this life, the personal estate of the testator, exclusive of the portion thereof which has been specifically bequeathed, was applied toward the payment of the pecuniary legacies of the will, but proved insufficient for their payment in full. The appellants, who are pecuniary legatees under the will, claim that by the terms of the will their legacies are charged upon the real estate of the testator not specifically devised; and they filed the bill in this case against the appellees, who are, or who represent, the persons to whom the residue of the estate was given by the will, to have the residuary real estate declared liable for the payment of the legacies. The appellees demurred to the bill. The Court below (DENNIS, J.), sustained the demurrer, and from its decree dismissing the bill, this appeal was taken.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Alfred S. Niles* (with whom was *Oscar Wolff* on the brief), for the appellants.

Whether a legacy is charged upon real estate is entirely a question of the intention of the testator. *Ogle v. Tayloe*, 49 Md. 159, 175; *Budd v. Williams*, 26 Md. 265; *Simmons v. Drury*, 2 G. & J. 32. The point, then, for this Court to determine, is this: "Did Charles Hoffman intend that these legacies should be paid out of his real estate, if the personalty proved insufficient? Or did he intend that the residuary devisees should get the real estate in full (less the specific devises) and at all events; and that the legatees

should only be entitled to as much of their legacies as the personalty might be sufficient to pay?"

In this will, by a fair and reasonable construction thereof, the testator intended to put his real and personal property together into one mass or blended fund, and from that mass to take certain legacies and devise, and then to devise and bequeath the remainder to residuary legatees or devisees. That when this is done the specific legacies are charged upon the land, seems to us settled for this State by this Court's late decision in *Seeger v. Leakin, Extr.*, 76 Md. 503, 509.

This intention to blend may be gathered from the terms of the residuary clause: "I give, devise and bequeath *the remaining portion of my estate.*" So clear has this seemed, that in England, in the Federal Courts and in most of the States, it is held that the use of words like these in the residuary clause is *conclusive* of this intention to blend, and necessarily charges the legacies previously given upon the land. *Jarman on Wills*, 6th ed., vol. 2, top p. 548; *Am. & Eng. Cyclopedia of Law*, vol. 13, p. 117, and cases cited in note 4; *Greville v. Browne*, 7 H. of L. cases, 689; *Baker v. Kehr*, 49 Penn. St. 223, 230; *Coxe v. Corkendall*, 2 Beas. Ch. 138; *White v. Kauffmau*, 66 Md. 92; *Lewis v. Darling*, 16 How. 1; *Convine v. Convine*, 24 N. J. Eq. 579; *Knotts v. Bailey*, 54 Miss. 235; *Moore v. Davidson*, 22 S. C. 101.

Although this Court may think that a residuary disposition, by means of the phrase—"balance of my estate," has been decided not conclusive evidence, *of itself*, of an intention to charge preceding legacies on land, still we insist that nowhere is it decided in this State, that the rules of common sense are to be suspended in construing the final clause of wills; or that any phrase—not a "*formula*,"—by which the testator devises the "remaining portion of his estate," after giving previous legacies, is not *exceedingly strong* evidence that he meant the residuary devisees to take nothing, either real or personal, under the residuary clause, until all previous bequests had been satisfied. This

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is the position now taken by the Courts of that State, whose lead we followed—although opposed to the current of judicial opinion—by adopting Chancellor Kent's views, as expressed in *Lupton v. Lupton*. See *Hoyt v. Hoyt*, 85 N. Y. 149.

*Samuel D. Schmucker* and *Thomas Hughes* (with whom on briefs were *Charles Marshall*, *George Whitelock*, *Barton & Wilmer* and *James M. Ambler*), for the appellees.

ROBINSON, C. J., delivered the opinion of the Court.

The question in this case is, whether certain legacies in the will of Charles Hoffman are charged upon his real estate? \*

The testator gave to his wife two thousand dollars absolutely, and then he gave to her all his real and personal estate for life, and after her death, he gave pecuniary legacies to some twenty odd persons, amounting in the aggregate to forty-five thousand dollars. The rest and residue of his estate he disposed of in the following language: "I give, devise and bequeath the remaining portion of my estate, first, to Alfred Bennett, two shares; to Mary Jane Hay, of the town of York, Pa., one share; to Maria, wife of Dr. Danl. P. Hoffman, one share; to Charles A. Wartman, one share; to Mrs. Eliza Rhodes, my niece, one share; to my sister, Louisa C. Jones, one share. The shares to be alike and of equal value."

The wife survived the testator about twenty years, and upon her death, the personal estate, which had been given to her for life, proved to be insufficient for the payment in full of the legacies. This will having been executed prior to the Act of 1894, ch. 438, the question is not affected by that Act, which provides: "In all wills hereafter executed the real estate of every testator not specifically devised shall be chargeable with the payment of pecuniary legacies, wherever the personal estate, after the payment of debts, shall prove to be insufficient, unless the contrary intention shall clearly appear."



Now, if the question arising upon this will was one of first impression, and we had to construe it by the language in the will itself and without reference to the construction which has been put by this Court upon similar language in other wills, there would be, we must admit, much force in the ingenious argument of the counsel for the appellant. For where a testator gives certain pecuniary legacies, and then gives the remaining portion of his estate, "or the rest and residue of his estate," it may be fairly argued, that he meant the remaining portion of his estate, after the payment of the legacies. And since the decisions in *Bench v. Biles*, 4 Madd. 187, and *Greville v. Browne*, 7 House Lord Cases, 689, this may be considered the established rule in England. But in this State, beginning with *Stevens v. Gregg*, 10 G. & J. 143, decided more than fifty years ago, and affirmed in *Power v. Jenkins*, 13 Md. 458, and reaffirmed in the recent case of *White v. Kauffman*, 66 Md. 89, it has been considered as settled law, that where a testator gives legacies, and then gives "the remainder of his estate, real and personal," or "the balance of his estate," or "the rest, residue and remainder of my estate," these and other like terms are not in themselves sufficient to show an intention on the part of the testator to charge the real estate with the payment of legacies.

These cases all proceed upon the principle that the personal estate is the primary fund for the payment of legacies; and even where the real estate is expressly charged with the payment of legacies, no resort can be had to the real estate unless the personal estate is insufficient, or unless the testator has by his will exonerated the personal estate from the payment of the legacies. And such being the case, legacies are never charged upon the real estate, unless the testator so declares in express terms, or such intention can be fairly and reasonably inferred from the terms and disposition of the will. The mere fact that the testator gives a legacy to one person and then gives the rest and residue of his estate to another, the residuary clause in itself is not

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sufficient to show an intention to charge the legacy upon the real estate. In *Lupton v. Lupton*, 2 Johnson's Chancery, 638, where the residuary clause was in these terms: "I give, devise and bequeath all the rest, residue and remainder of my real and personal estate not hereinbefore already devised and bequeathed," Chancellor Kent says: "This clause does not appear to me to afford evidence of an intention to charge the land with these pecuniary legacies. If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause and a kind of formula in wills." And this language of Chancellor Kent was quoted with approval in the early case of *Stevens v. Gregg*, and in *White v. Kauffman*, the latest case in which this question has been considered.

In the will before us, the residuary clause is "the remaining portion of my estate;" in *Stevens v. Gregg*, the language was, "the remainder of his estate, real and personal;" in *Power v. Jenkins*, "the balance of my estate." All these expressions mean the same thing, and if so, these cases must be considered conclusive of the question, unless the intention to charge the real estate can be inferred from the general disposition of the will. And it was argued that the fact the testator had given to his wife the entire estate for life was in itself sufficient proof of an intention to make all his property, real and personal, one fund, out of which the pecuniary legacies were to be paid; and *Ogle v. Tayloe*, 49 Md. 158, was relied on, in support of this view. In that case the legacy was held charged on the real estate, but it was so held under a will widely different from the one now before us. There the testator gave his entire personal property to his wife for life, but to have the entire control over it, and to do with it as she might think best. Then he gave to his wife, for life, his real estate, being about fourteen hundred acres of land, and upon her death he gave the real estate to his two sons, Richard and George, to be equally divided between them. And then he gave to his daughter a legacy of three thousand dollars, to be paid to

her by her brothers upon their coming into the possession of the property on the death of their mother. The fact that the legacy was made payable by the brothers upon their coming into possession of the property, together with the further fact, that the widow, the life-tenant, had the right to dispose of the personal property in any manner she might think fit, were facts from which it might be fairly and reasonably inferred that the testator meant that the legacy to his daughter, being the only provision he had made for her, should be charged on the real estate devised to her brothers. "To confine the payment of the legacy to the personalty," say the Court, "would have made it dependent on the use and consumption of the widow, who had an absolute right of disposal by the terms of the will."

Nor do we see how it can be said that there has been such a blending of real and personal property as to constitute one fund, out of which the testator meant that the pecuniary legacies should be paid. He gives, it is true, his entire real and personal estate to his wife for life, and he empowers his executors to sell the whole or part of a tract of land on the York Road containing forty-one acres, the proceeds to be invested for the same uses and purposes as above expressed. That is, if they deemed it best to sell this tract or any part of it, the proceeds were to be invested and the interest thereon to be paid to his wife during her life. And then upon her death, he gives to one person certain ground rents, partly in fee and partly leasehold, and three thousand dollars in money; and then to another person a ground rent, partly fee and partly leasehold, and five thousand dollars; and then to another person twenty-five hundred dollars, and so on down to the residuary clause, by which he gives the remaining portion of his estate to the persons therein named. The remaining portion, as construed in the cases to which we have referred, means the remaining portion of his personal estate, if there should be any left after the payment of the legacies, and the remaining part of the real estate not previously disposed of. In

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Syllabus.

no sense, however, does he treat his entire estate, real and personal, as a blended estate, constituting one fund out of which the legacies were to be paid. So, construing this will according to the well-settled law in this State, we find nothing either in the terms of the will or the general disposition of the property, from which it can be fairly inferred that the testator meant to charge the pecuniary legacies upon his real estate.

*Decree affirmed.*

(Decided February 28th, 1895.)

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THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* THE PRESIDENT, MANAGERS AND COMPANY OF THE BALTIMORE AND YORK-TOWN TURNPIKE ROAD, AND THE CITY AND SUBURBAN RAILWAY COMPANY.

*Turnpike Companies—Cession of Roadbed to Baltimore City—Requisites of Cession—Changing Grade of Road—Police Power of the State—Equity Practice—City Solicitor.*

Under Code of Public Local Laws, Art. 4, sec. 818, when a Turnpike Company cedes to the city of Baltimore any portion of its road lying within the corporate limits, it thereby becomes a public street without any act of acceptance on the part of the municipal authorities.

This power to cede is not restricted to those portions of the turnpike roads which were within the city limits at the time the Act was passed, but the statute, being in general terms, includes the right to cede to the city such parts of the roads as are within the city limits as extended subsequently.

But when a Turnpike Company exercises this power, it must make the cession without the reservation of any rights, and the road ceded must not be burdened with any easements.

The defendant company executed and placed on record a deed to the Mayor and City Council of Baltimore granting and ceding to the city that portion of its road within the city limits, subject to certain railway franchises previously granted to other corporations. This deed was not accepted by the city. *Held*, that the deed should be declared null and void since the road ceded was burdened with easements in favor of the Railway Companies.

A Turnpike Company, incorporated in 1804, was authorized by charter to grade its road. Subsequently the limits of Baltimore City were extended so as to include a part of the road. The company graded its road so that it was made to run some feet below the surface of certain public streets intersecting the same. *Held*,

- 1st. That the charter of the company (having been granted without a statutory or constitutional reservation of the right to alter) could not be impaired by subsequent legislation; that consequently the right of the company to change the grade of its road continued, but that the exercise of this right was subject to the police power of the State.
- 2nd. That the municipality had a right to demand from the Turnpike Company compensation for the cost to be incurred in making the grade of said intersecting streets conform to the altered grade of the turnpike.

Where a bill in equity is filed by the city solicitor in the name of the Mayor and City Council, the presumption is that it was filed by their authority.

Appeal from a decree of Circuit Court No. 2, of Baltimore City (WICKES, J.), dismissing the bill of complaint filed by the appellants. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

*Thomas G. Hayes, City Counsellor, and William S. Bryan, Jr., City Solicitor, for the appellant.*

Section 818 of Art. 4, Public Local Laws, does not in any way apply to the portion of the York Road between the present and the old city limits; that it must have meant the same now that it did when first enacted in 1825; and that then it obviously only applied to the portion of the roadbed within the old city limits.

The meaning and scope of this section was merely to enlarge the corporate capacity of the Turnpike Companies, and to prevent the cession of a portion of their road from being void as *ultra vires*. The familiar canon of construction that all grants are to be construed most strongly against the grantee has nowhere been more consistently

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enforced than by this Court. *North Baltimore Passenger Railway Company v. North Avenue Railway Company*, 75 Md. 243. "Doubts as to what is granted are resolved in favor of the grantor, or, as often epigrammatically said, a doubt destroys a grant." *Horse R. Co. v. Interstate, &c., Co.*, 24 Fed. Rep. 308.

The word "cede" is synonymous with *grant* and does not mean the same thing as *abandon*. "May cede" is not a mandate to the city to take.

This deed on its face shows that the attempt is made not to give the *whole* bed of the turnpike as it existed when the law was passed, but to give the bed of the road subject to the dominant servitude created or attempted to be created in the Street Railway Company by the deed of grant from the Turnpike Company of 1891. If the city was to accept this deed, it is to say the least, very doubtful whether they would not be estopped from questioning the legality of any of these covenants. *Fulford v. Keerl*, 71 Md. 397; *Mahoney v. Mackubin*, 54 Md. 268; *Hough v. Horsey*, 36 Md. 184. It might be that the Legislature could have intended to force the city to take the *whole* of a portion of a road unencumbered by entangling grants and covenants, and at the same time have been utterly unwilling to force them to take a piece of road loaded down with easements and other private rights which might in the future be extremely detrimental to the public.

The charter of the York Road Co. gave it the right to change the grade of the road. But it is contended that this power does not exist within the city limits. That the power given to the City Council in sections 806 to 819 A of Art. 4, Code of Public Local Laws, is exclusive in its nature. A turnpike is a public highway. The only differences between it and ordinary highways are two. 1st. A private corporation has cast upon it the duty of keeping the turnpike in repair. 2d. In consideration of this duty it has the privilege of collecting tolls from all persons using it. *Angell on Highways*, sect. 9; *Elliott on Streets and Roads*,

p. 53; *Hiss v. Balto. & H. R. R. Co.*, 52 Md. 254. As said by JUDGE DORSEY in delivering the opinion in *Dugan v. Baltimore* (5 Gill & Johns. 375): "All our turnpike roads are common highways, and free for the public use, but not free from the collection of tolls."

Fixing the grades of public highways and determining whether the public convenience or the public health require that these grades shall be changed from time to time, is obviously a matter of police regulation. Being a matter of police regulation, the Legislature of 1804 could not have made any valid contract with the Turnpike Company in its charter that it should forever have the right to change the grade of its road; the most it could do, the most it was the agent of the public to do, was to give the Turnpike Company a permissive license, revocable at any time, to fix and alter grades. See *Chicago Lake Front case*, 146 U. S. 387; *Lake Roland case*, 77 Md. 352; *North Balto. Co. v. Baltimore*, 75 Md. 250; *N. Y. Co. v. Bristol*, 151 U. S. 567.

It has been flatly decided in other jurisdictions, that where land is within the limits of an incorporated town, which has its local paving and grading laws, the general laws of the county or State, in regard to grading and repaving of roads do not apply, and that if the county supervisor attempts to repair the road he is a trespasser. *State v. Mainey*, 65 Indiana, 404; *Town of Ottawa v. Walker*, 21 Illinois, 605; *Macallum v. Black Hawk Co.*, 21 Iowa, 411; *State v. Jones*, 18 Texas, 874.

And this Court itself has recognized the doctrine we here contend for in two recent decisions. "It has for a long time been recognized as the law that the Mayor and City Council of Baltimore have *full and complete control* over the streets and highways of the city." *Lake Roland R. R. case*, 77 Md. 357. "The power of the Mayor and City Council of Baltimore over the streets cannot be regarded as within the region of debate." *Postal Telegraph Co.'s case*, 29 Atlantic Rep. 891.

If the changing of the grade had been lawful, it would still

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have been unlawful to so do the work as to leave the cross streets in a useless and dangerous condition. It is clear law that when a new way or road is to cross another it must be done with as little injury as possible to that other. *N. C. R. Co. v. Baltimore*, 46 Md. 425. And the same must be true when the grade of an existing way is to be changed. So that even if the turnpike company had had the right to do the grading, and it had been done in good faith for the benefit of the Turnpike Company, it would still have been unlawful to have done it as it was done, and to have left the cross streets without adequate and proper means of egress and ingress.

*E. D. J. Cross* (with whom was *John K. Cowen* on the brief), for the appellees.

There are two questions presented by the appeal in this case: (1.) The right of the Turnpike Company to make the deed of cession; and (2) the authority of the city to file the bill in its present form.

It is submitted that under the provisions of the Public Local Code the Turnpike Companies within the city limits have the right at any time to cede the same to the city, and that upon such cession they become immediately the public streets of the city. It is not necessary to inquire into the intent of the Legislature in passing the Act of 1825 and the codification of 1860. The Legislature, in its authority to control the city, could direct the city to acquire by purchase, condemnation or cession, the portions of the turnpikes within its limits, the object being to give municipal control over that portion of the highways within its boundaries, and to relieve the public from the onus of the charges for the use of the same. *Pumphrey v. M. & C. C. of Baltimore*, 47 Md. 145; *M. & C. C. of Baltimore v. Reitz*, 50 Md. 581; *O'Brien v. County Commissioners of Baltimore County*, 51 Md. 23.

It is not an objection to the grant that the rights of the Street Railway Company in the portion of the turnpike should be reserved by the deed, because these rights were



created by the Legislature, were acquired by the Turnpike Company under the authority of the Act of 1860, and by the expenditure of the large amount of money necessary to construct the railway; and the Turnpike Company had the authority under the Act of 1872, chapter 337, to sell to any other corporation these rights and franchises, and the other corporation had the right to receive them and to exercise them, and this right was not subject to the control of the Mayor and City Council. The portion of the turnpike not so occupied remained a turnpike in its entirety, with the right of those who used the same to enjoy the improvements put thereon at this large expenditure. The construction by the Street Railway Company of its track on the turnpike did not render the turnpike any less a public highway, and it did not cease thereby to be a turnpike. The objection, alleged by the city, to the grant, because the grade of the same was lower than certain intersecting streets, we submit, has no force. This change of grade was done under the charter power of the company, and has been recognized as a valid exercise of that power by this Court in the recent case of *Green v. this defendant*.

*Second.*—The bill of complaint was filed subsequent to the grant. The Mayor did not bring the matter to the attention of the City Council, but the bill was filed by the Mayor, without any authority from the City Council. It is submitted that it was the duty of the city authorities, when the deed was made, if the same should not be acceptable to them, to have had the action of the legislative portion of the municipality upon the matter, and that the Mayor, *ex officio*, has not the authority to reject a grant, made in conformity to law, and the right to litigate, in the name of the Mayor and City Council, does not reside in the Mayor alone; and it is for this reason that the supplemental answer was filed on the 18th of September, 1894, bringing this matter to the knowledge of the Court, and that the Court could not have jurisdiction to consider the bill of complaint, unless it had been properly filed. A suit

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in the name of the municipality, instituted without authority, will be dismissed by a Court. *Kankakee v. R. R. Co.*, 115 Ill. 88; *Dillon Mun. Corp.*, sec. 479.

ROBINSON, C. J., delivered the opinion of the Court.

The Baltimore and Yorktown Turnpike Company was incorporated by the Act of 1804, chapter 51, to build and maintain a turnpike road from the city of Baltimore to the Pennsylvania line.

By the Act of 1860, chapter 209, the company was authorized and empowered to build a passenger railway on its road-bed from Baltimore to Towsontown. Having built and operated the street railway for a number of years, the company, under power conferred by the Act of 1872, chapt. 337, sold and conveyed to the Baltimore Union Passenger Railway Company the franchises, rights and privileges of the street railway conferred upon it by the Act of 1860.

Having thus disposed of the street railway, the Turnpike Company, by its deed dated 19th October, 1893, conveyed to the Mayor and City Council of Baltimore that part of its road lying within the city limits, as extended under the Act of 1888; *subject, however, to the grant made to the Baltimore Union Passenger Railway Company of the franchises, rights and privileges of the street railway, and subject also to the rights of the City and Suburban Railway Company, its successor.*

The right thus to surrender this portion of its road is claimed by the Turnpike Company under the Act of 1824, chapt. 105, codified as Sect. 818, Art. 4 of Public Local Laws for Baltimore City, which provides: "The president, directors and companies of the different Turnpike Companies owning roads running into the city of Baltimore may cede to said city such parts of said roads as lie within the corporate limits of said city, and the same, when ceded, shall be in all respects subject to the same regulations as unpaved public streets."

This deed, however, the city authorities refuse to accept, and they insist that the word "cede," as used in the Act, is synonymous with and to be interpreted in the same sense as the word "grant," and being a grant, the deed is inoperative until it has been accepted. And we have been referred to quite a number of dictionaries, as to the meaning of a word in no sense a technical word, but one in every-day use, and about which there ought not to be any difficulty as to its natural import and meaning. Like many other words, its precise meaning and signification depend somewhat upon the subject-matter in connection with which it is used. In some instances, it may, it is true, be used in the sense of "grant," but ordinarily it means to "yield," "surrender," "give up." But this, however, is not merely a dictionary question. We are dealing with an Act of the Legislature, conferring upon a Turnpike Company the power to cede to the city that part of its road lying within the corporate limits, and which, when ceded, the Act declares shall be a public street. There can be no difficulty, it seems to us, as to its meaning thus used. The Turnpike Company having accepted its charter and having built its road, could not at its own pleasure "cede" or "surrender" any portion of its road, unless by power conferred by the Legislature. Nor could the city, however desirable it might be, acquire any part of turnpike road within its corporate limits except by purchase or by condemnation. And this being so, the object and sole object of the Act was to confer this power upon the Turnpike Company, should it deem it advisable to surrender any part of its road to the city. It was never supposed for a moment that there would or could be any objection on the part of the city authorities to a surrender of the road thus made without *compensation*, by which a *toll-road within the city* limits was thereby made a *free highway*. And hence the Act declares that the portion of the turnpike thus ceded shall thereupon become a public street. All the Act requires or means is that the Turnpike Company shall cede to the city the portion of its road lying within the cor-

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porate limits, and when ceded, the road, by operation of the Act itself, becomes a public street, and this too without any act of acceptance on the part of the city authorities by ordinance, resolution or otherwise.

But then again it is said the power to cede is limited to that part of road lying within the city limits at the time the Act was passed ; and the Turnpike Company has no power, therefore, to cede that part of its road lying within the city limits, as extended by the Act of 1888. The Act does not so say in terms ; on the contrary, the power is conferred in general terms, and it would, it seems, be a narrow construction of a power mainly conferred in the interests of the city itself. We cannot agree with the counsel for the appellant that the Legislature could not have foreseen that in sixty or seventy years the limits of the city would be extended two miles at least beyond the old city limits. We see no good reason for imputing such a want of foresight to the General Assembly. Baltimore was at that time a growing and prosperous city, and to any one of ordinary judgment, it must have been apparent, we think, that an extension of its limits at some time in the future would be absolutely necessary to its proper growth and development. Whether one mile or two miles, or even further, no one could tell, but any extension of its limits would necessarily include portions of some if not all of the several turnpikes then leading in every direction from the city. And as it would be to the interest of the city that these several turnpike roads should be converted into free highways, this power was not restricted to the portions of the roads within the city limits at the time the Act was passed, but was conferred in general terms, thereby enabling them to cede not only such portions, but also such parts of their roads as might be within the city limits, should the limits be thereafter extended.

We come, then, to the last objection and one which it seems to us is fatal to the deed in question, and that is, the deed is made subject to the grant of the Turnpike Company to the Baltimore Union Passenger Railway Company of the

franchises, rights and privileges of the street railway, with the right on the part of the latter company to use, manage and enjoy such franchises *in perpetuity*, and subject also to all the rights of the City Suburban Railway Company, its successor. The Act of 1824 does not make it obligatory on the Turnpike Company to cede any portion of its road to the city, but if it proposes to exercise the power thereby conferred, it must make the cession without the reservation of any rights either in his own behalf or of its assignees. It has no right to surrender a part of its road burdened with easements which it claims the right to create in *perpetuity*. The Act contemplated and by every fair rule of construction means that the turnpike shall be ceded *unencumbered*, and when so ceded the Act declares that it shall thereupon become subject to all the regulations applicable to unpaved public streets. How far and to what extent this deed, made subject to the grant of the Turnpike Company to the Baltimore Union Passenger Railway Company, would affect the control of the city authorities over the portion of the road thus ceded, it may not be easy to determine. It is sufficient to say, that if it would not in any manner interfere with their control over it as a public street, then it was altogether unnecessary to make the deed subject to this reservation, while, on the other hand, if it would interfere with such control, then the Turnpike Company had no right to surrender the road on such terms. And it is no answer to say the street railway was built and its franchises were sold under power conferred by the Legislature. This may be true, but when these franchises and powers were granted the turnpike belonged to the company, and the portion of its road on which the street railway was built was at that time beyond the corporate limits and in no manner subject to the control of the city. And whilst the extension of the city limits can in no manner affect the franchises and privileges granted to the Turnpike Company, in connection with the street railway, at the same time, if it proposes to cede to the city part of the turnpike now within the corporate limits, the cession must be made without

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reservation as to easements created by it without the assent or concurrence of the city authorities.

And this brings us to the only remaining question, and that is: Whether the Turnpike Company has the right to grade its road within the city limits as extended by the Act of 1888. As a general rule the Mayor and City Council have the exclusive control of the highways and streets within the corporate limits. But the Turnpike Company was chartered by the Act of 1804, and there is no reservation in the charter itself, nor in any general law, nor in the Constitution then in force, reserving the right to amend or alter the charter thus granted. It became, therefore, a contract between the State and the corporators, within the protection of the Constitution of the United States, which forbids any State from passing laws impairing the obligation of contracts. Among the powers granted to the company was the right to grade its road, and this right we have said is a continuing right, to be exercised from time to time, as the necessities of the company or the public convenience may require. *Peddicord's case*, 34 Md. 463. Being then a chartered right, the extension of the city limits, so as to include part of the turnpike, could not interfere with or deprive the company of the lawful exercise of this right. Neither the city authorities nor the Legislature itself could deprive it of this right. At the same time, the exercise of this right is subject to the paramount governmental power, known as the police power, inherent in every well-organized government, and to be exercised when the safety and welfare of the community requires it. It is a power which the Legislature can neither alienate nor surrender, and every chartered privilege is granted on the implied condition that it is to be exercised subject to this power. As was said by Mr. Chief Justice Fuller, "It is likewise established that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process of law, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legis-

lative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." *N. Y. & N. E. R. Co. v. Bristol*, 151 U. S. 567.

Now, the proof shows that in grading its road within the city limits, the turnpike bed has been lowered from three to four feet below the surface of certain public streets which intersect the road. The public is entitled to the use of these streets for all the purposes for which they were opened and dedicated. It is entitled to the use of them in going to and from the turnpike road, and the company has no right to so grade its road as to endanger the safety of persons thus lawfully entitled to the use of the public streets. The grading has been done, and all the city now asks is to be reimbursed or compensated for expenses necessarily to be incurred in making the grade of the intersecting streets conform to the grade of the turnpike. And this we all agree the city authorities have the right to demand.

In the brief of the appellees the point is made that this bill has been filed without the lawful authority of the Mayor and City Council. It is filed by the city solicitor in the name of the Mayor and City Council, and in the absence of proof to the contrary, we must presume that it was filed by their authority. As to the City and Suburban Railway Company, we agree with the Court below, that the bill ought to be dismissed as to that company.

*Decree affirmed in part and reversed  
in part, and cause remanded.*

(Decided February 28th, 1895.)

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Syllabus.

SAMUEL G. ACTON *vs.* THE STATE OF MARYLAND.

*Boundary of Anne Arundel County—Criminal Pleading—Venue—Judicial Notice of Territorial Divisions of the State.*

The jurisdiction of the Circuit Court for Anne Arundel County extends to the channel of the Patapsco River.

In a criminal information the venue is sufficiently laid when the county is named in the margin and the place where the offence was committed is named in the information as being in the county aforesaid.

The Court will take judicial notice of the civil divisions of the State created by statute.

Appeal and writ of error from the Circuit Court for Anne Arundel County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Robert Moss* and *James M. Munroe* for the appellant.

*John Prentiss Poe*, Attorney-General, and *E. C. Gantt* for the appellee.

PAGE, J., delivered the opinion of the Court.

The information of the State's Attorney for Anne Arundel Co., upon which this case was prosecuted, is as follows:

*"State of Maryland, Anne Arundel County, to-wit:*

THE STATE OF MARYLAND } charged, &c.

*vs.*

SAMUEL G. ACTON.

} In the Circuit Court for Anne Arundel Co. Criminal Information.

The above entitled case having, &c., &c., and Edward C. Gantt, the said State's Attorney for said county, having investigated, &c., &c., now comes into said Court, and for



and in behalf of the State of Maryland, upon his official oath gives the said Court here to understand and be informed, that Samuel G. Acton, late of the county aforesaid, on the tenth day of June, in the year of our Lord eighteen hundred and ninety-four, the same day and year aforesaid being the Sabbath day, commonly called 'Sunday,' at a building erected in the waters of a navigable river, to-wit, the Patapsco River, at a place in said river situate below the head of said river, and below the southermost great branch of said river, and on the south side of the channel of said river, and distant less than one hundred yards of the land shore of the first precinct of the fifth election district of the county aforesaid; said building, erected as aforesaid, being contiguous to the land of the said first precinct of the fifth election district of the county aforesaid, unlawfully, &c., &c." The defendant pleaded want of jurisdiction, because the place alleged, as that where the alleged offence was committed, was not within the limits of Anne Arundel County. To this plea the State interposed a demurrer, which was sustained, and judgment thereon rendered.

According to well-settled principles, a demurrer brings under review by the Court all the pleadings in the case. And this being so, the sufficiency of the information is before us in the same manner and to the same extent as if the demurrer had been interposed by the traverser.

The questions presented, therefore, are: 1st. Has the Circuit Court for Anne Arundel County jurisdiction over that part of the Patapsco River which is described in the information; and 2nd. If it be determined that it has, are the allegations in the information as to the venue sufficient in law.

1st. By the Act of 1698, ch. 13, Baltimore County embraced a portion of what is now Anne Arundel County. By the Act of 1726, ch. 1, it was enacted, that from and after the last day of May, 1727, the land lying on the south side of Patapsco River, and contained within the bounds following, viz: From the mouth of said Patapsco River

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with the said river to the head thereof; and from thence, bounding on the south side of the main falls, being the southernmost great branch of said river, and running as the said branch runs to the first main fork of the said falls; then bounding on the south side of the said southernmost fork, till, &c., &c., shall be and forever hereafter deemed as part of Anne Arundel County." In the case of *Raab v. The State*, 7 Md. 497, JUDGE TUCK delivering the opinion of the Court, said: "It is manifest that the river, after this Act, remained as it had been for many years, within the limits of Baltimore County, and that the jurisdiction of these counties adjoined on its southern shore, unless affected by the Act of 1704, ch. 92 (now codified as sec. 135 of Art. 75 of the Code), which provides that every county lying on any navigable river in this province shall extend its jurisdiction from the shore to the channel of such river that divides the counties, and be divided from the other county by the channel of the said river; and, under this Act, if applicable, the river, as far as the channel, remained in Baltimore County and subject to the jurisdiction of its Courts." So that, under this decision, it is clear that if the Act of 1704, ch. 92, is applicable, the jurisdiction of Anne Arundel County must extend to the channel of the river, and will include all that space which lies between the limits of Anne Arundel County as described in the Act of 1727, and the channel. And we are of the opinion that such is the proper application of that Act. We adopt on this point the views so well expressed by JUDGE BREWER in his opinion on deciding in the lower Court in *Raab v. The State* (*supra*), as found on page 486 of the printed report. That learned Judge, in dealing with the contention that the Act of 1704 applied only to the counties mentioned in the Act, said: "I do not think it is so confined. A part of the State only was, at that time, laid off into counties. It must have been then contemplated to lay off other counties. The bounds between Cecil and Kent and the upper bounds of Cecil were not accurately defined, nor the bounds of Talbot on every side,

nor were the upper bounds of Baltimore and Prince George's. Some of the other counties thereafter to be laid off might be bounded by navigable rivers, and the object of the Act of 1704, although it refers only to the counties already laid off, seems to be to establish a rule applicable to all similar cases. The language of the law in the enacting part of the clause is very general, 'that every county lying on any navigable river.' The Legislature is establishing a rule applicable to a particular class of cases, and why should not the rule apply to all subsequent additions to that class?" This Act has been codified as sec. 135 of Article 75, and differs from the Act as originally passed, only in the respect that it is not made to apply "where a dividing line has been fixed in such river by law." No such line has been fixed with respect to Anne Arundel. By the adoption of the Code this section became the law of the State, and is now applicable, whatever may originally have been the design of those who enacted it, to every county lying on navigable rivers in the State, except "where a dividing line has been fixed in such river by law."

2nd. The rule in setting out the venue is well stated in 1 *Chitty on Crim. Law*, 194, as follows: "In the body of the indictment also, the facts should in general be stated to have arisen in the county in which the indictment is preferred, so that it may appear that the offence was within the jurisdiction of the Court; and therefore, if a parish, vill or other place where the offence or part of it occurred be stated without naming the county in the margin or expressly referring to it by the words 'the county aforesaid,' the indictment will be defective." See also 1 *Wharton Am. Crim. Law*, sec. 223, *et seq.*; 1 *Bishop on Crim. Procedure*, sec. 101, *et seq.*, and authorities there cited.

In the margin of the information are named the county and State, and in the body the place is described, "at a building erected in the water of a navigable river, at a place in said river situate below the head of said river, and below the southermost great branch of said river, and on the

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south side of the channel of said river and distant less than one hundred yards of the land shore of the first precinct of the first election district of the *county aforesaid*." The Court will take judicial notice of the civil divisions of the State created by statute, *The People v. Breese*, 7 Cowen, 430, and therefore inasmuch as the bounds of Anne Arundel are fixed by statute, and the jurisdiction of the county is fixed to the centre of the channel by the Act of 1704, and in addition thereto the county is expressly named in the margin, it would seem the *venue* is sufficiently laid. What we have said has no reference to the 286th section of Article 27 of the Code. Whatever may be the proper construction of that Act, we are of opinion that by the ordinary rules of criminal pleading the information must be sustained.

Finding no error in the ruling of the Court below, the judgment will be affirmed.

*Judgment affirmed.*

(Decided March 1st, 1895.)

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THEODORE COOKE *vs.* THE BALTIMORE TRACTION CO.

*Negligence—Turning Corners by Electric Cars—Rights of Travelers on Highways—Contributory Negligence.*

The question of negligence growing out of an injury by a Street Railway Company to a person rightfully upon a public thoroughfare, is governed by principles different from those applicable to an injury inflicted by a Steam Railroad Company upon a trespasser wrongfully upon the company's right of way.

The propulsion of an electric or cable car at full speed around the corner of a street, in a populous city, without a previous look out to ascertain whether the track is clear or not, is an act of negligence.

Plaintiff drove at night upon the track of the defendant just after crossing the street where the track turned the corner. Before doing so

he looked to see if a car was approaching on that track, and neither saw nor heard one. About ten feet from the corner his vehicle was struck from behind by an electric car which had swung around the corner at full speed, without a headlight and when no bell had been rung. The motorman could have seen the plaintiff when he drove upon the track. *Held,*

- 1st. That such facts constitute evidence of negligence on the part of the defendant.
- 2nd. That the failure of plaintiff to see or hear the car was not contributory negligence in law, because he made every reasonable effort to look and listen.

Where the nature of the act relied on to show negligence contributing to the injury can only be determined by considering all the circumstances surrounding the transaction, it should be passed upon by the jury, and it is not for the Court to determine its quality as matter of law.

Appeal from the Baltimore City Court. The case is stated in the opinion of the Court. At the conclusion of the plaintiff's evidence, the trial Court (WRIGHT, J.), instructed the jury that "though they should find the defendant guilty of negligence, yet the uncontradicted evidence shows that the accident happened by reason of the contributory negligence of the plaintiff, and their verdict must therefore be for the defendant."

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*Wm. Pinkney Whyte*, for the appellant.

*Edward Duffy*, for the appellee.

At the close of the plaintiff's testimony, the Court, at the request of the defendant, instructed the jury to find for the defendant, because of the contributory negligence of the plaintiff. The plaintiff himself admitted that had he seen the car he would not have crossed, but should have stopped, which would have been the proper thing. He was going at the rate of 5 miles per hour, and at the instant of passing the building line he could only see 25 feet down Fayette street, and this distance rapidly decreased. It cannot be

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disputed that the car was on Fayette street, and it must have been very near the plaintiff at the time that he crossed. The only reason that he did not see it was because he did not look. The car was coming towards him and he goes almost immediately in front of it without looking. It is submitted that this was contributory negligence on his part. *Dyrenfurth's case*, 73 Md. 374; *Carson v. Rwy.*, 147 Pa. St. 219; *Ehrisman v. Rwy.*, 150 Pa. St. 180; *Wheelahan v. Rwy.*, 150 Pa. St. 187; *Thomas v. Rwy.*, 132 Pa. St. 504.

The only alleged negligence is the non-ringing of the bell. If the bell was not rung, this did not excuse the plaintiff from looking when he was about to cross the tracks of a railway. If he does not look, and a collision takes place, such collision happens by reason of the folly and recklessness of the plaintiff, and not by reason of the carelessness of the defendant. *Schroeder's case*, 69 Md. 551. *Bacon's case*, 58 Md. 482.

If, as it has attempted to be shown, the plaintiff was guilty of contributory negligence, then the only theory upon which the plaintiff's case could have been submitted to the jury, was upon the theory that the defendant could have avoided the consequences of such contributory negligence. Of this latter fact there was no evidence. The case was properly taken from the jury.

McSHERRY, J., delivered the opinion of the Court.

This is another of the numerous negligence cases which have come before us from Baltimore City since the rapid transit system was introduced there. It is a case growing out of the alleged carelessness of the employees of a street railway company, whereby the vehicle of the plaintiff, which was rightfully on a public street of Baltimore, was run into and demolished by a cable car belonging to and operated by the defendant company. The legal principles applicable to and governing such a case have been frequently and explicitly announced by this tribunal; but repeated efforts to invoke and rely on doctrines which have

exclusive application to a totally different class of decisions render it necessary for us to briefly reiterate what was supposed to be thoroughly and definitely settled. There is, to begin with, no possible analogy between a case growing out of an injury caused by a street railway car to a person rightfully upon the public thoroughfare, and a case involving an injury inflicted by a steam railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so, because the citizen has the same privilege to use the street for travel that the street railway company has for propelling its cars thereon ; and the railway company has, apart from its franchise to lay its rails, no right to the use of the street as a highway superior in any degree to that possessed by the humblest individual. The franchise to lay its rails upon the bed of a public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize and respect the rights of every pedestrian or other traveler, and if by adopting a motive power which has increased the speed of its cars, it has thereby increased, as common observation demonstrates, the risks and hazards of accidents to others, it must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent. This is so self-evident and manifest that no argument is needed to support it.

Negligence is essentially relative and comparative, not absolute. It is not even an object of simple apprehension apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings they inevitably change their original signification and import. Hence it is intrinsically true that those things which would not under one condition constitute negligence, would, on the other hand, under a different, though not necessarily an opposite

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condition, most unequivocally indicate its existence. Thus an act which would have been neutral or indifferent when street cars were drawn by horses at a comparatively low rate of speed, and could consequently be readily brought to a stop as occasion required, would become culpably negligent since the change of motive power and the great acceleration of speed incident thereto under the rapid transit system. The existence of negligence is therefore to be sought for in the facts and surroundings of each particular case. But there will generally be found standing prominently out in many instances of this character a disregard of the safety of others, a want of caution to avoid injury where the duty to use that caution is incumbent, and a reckless or heedless use of dangerous agencies in localities where the peril from their use is obvious. When these conditions or any of them are presented, and an injury is inflicted in consequence upon another, a case of actionable negligence has been made out, provided the plaintiff is himself free from contributing blame.

Now, the case before us, as presented by the plaintiff's evidence, discloses the following facts: The defendant operates its street cars by a cable. Part of its route extends over portions of Fayette and Gilmor streets. At the intersection of these two streets the double tracks of the company curve sharply around the northeast corner. The right-hand track on Fayette street, as you face the west, is used by cars going west on that street and north on Gilmor street, and the left-hand track is used by cars going south on Gilmor and east on Fayette streets. The plaintiff, who is a physician, was returning in his buggy, about a quarter before eleven on the night of the accident, from visiting a patient, who lived on Gilmor street, south of Fayette. Driving to the northward on Gilmor street, he kept, as he ought to have done, on the right or eastern side. Before reaching Fayette street, which he was compelled to cross in order that he might continue on up Gilmor street, he saw a car coming south on Gilmor, north of Fayette street, towards



him. When it reached the point where the curve bending into Fayette street begins, it stopped. After he had passed the building line of Fayette street he looked east, down Fayette street, to see if a car was approaching on the right-hand track up that street towards Gilmore street, and he neither saw nor heard one. The boy who was with him leaned out of the buggy and also looked with a like result. There were street lights burning on the corners of these streets. The plaintiff was driving at a speed of four or five miles an hour. From the time he emerged from behind the houses on Gilmore street and passed the building line of Fayette street, with these lights shining full upon him, he was clearly in a position where the gripman of the car going west on Fayette street had an unobstructed view of him, and the gripman either saw, or by the use of the slightest care could have seen that the plaintiff was driving straight towards the track upon which the car was moving. Notwithstanding this he rang no bell, gave no signal or warning, but swung his car around the curve into Gilmore street, at full speed, without a headlight, and about ten feet north of the northeast corner crashed into the plaintiff's buggy, forcing it against the car standing on the opposite track and shivered it into splinters. The gripman had ample time to check the speed of his car; and if he saw that the plaintiff was driving to a place of peril he was bound to stop and avoid a collision otherwise inevitable. If he did not see the plaintiff he was equally negligent in not stopping before sweeping around the curve, because a proper regard for the safety of persons who might be rightfully on the east side of Gilmore street above Fayette, and who would therefore be beyond the reach of his vision by reason of the intervening buildings along the north side of Fayette street, imperatively required him to stop before venturing around the curve, and to ascertain that the track beyond or north of the corner was clear. There could scarcely be a more flagrant act of gross negligence than the reckless propulsion of a traction or electric car, at full speed, around the corners of streets

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in populous cities. To escape the consequences of such wanton carelessness these companies should cause their cars to stop before turning such curves, and then to proceed under perfect control until the curve has been passed and the straight track comes into unobstructed view. It is no answer to say that this would occasion the companies great inconvenience and delays. The safety of persons rightfully on the thoroughfares is not to be put in peril because a due regard for that safety will impose upon and exact from street railway companies using dangerous agencies, such additional inconveniences and delays. Upon the question, then, of the defendant's negligence, there was ample evidence to go to the jury.

The Baltimore City Court, however, at the instance of the defendant, directed the jury to render a verdict for the defendant, upon the ground that the uncontradicted evidence showed that the accident happened by reason of the contributory negligence of the plaintiff. The verdict was so returned and recorded, and judgment was entered thereon in behalf of the defendant, and the plaintiff then took this appeal. The instruction thus granted is erroneous.

It cannot be pretended that the plaintiff blindly drove into a perilous situation or was careless as to his own safety. He and the boy who was with him looked down Fayette street in the direction an approaching car would come before driving over the tracks. That he saw and heard no car coming up that street is of itself no evidence of contributing negligence, because he made every reasonable effort to both look and listen for the approach of one; and herein the case at bar widely differs from *Dyrenfurth's case*, 73 Md. 374. His not seeing it, even though he did look for it, is quite a different thing from his not seeing it, by reason of his failure to look at all. In the latter instance his failure to see it would have resulted from his omission to do that which it was his plain duty to do, viz., to look; whereas, in the first instance, his failure to see it might have resulted from one or more of many causes which involved no negligence on his

part whatever. To say that his failure to see the car when he did look is, as an indication of negligence, equivalent to a failure to see it when he did not look, is to ignore the self-evident difference between an affirmative attempt to avoid an injury and a reckless indifference to the happening of one. He had a right to drive along the streets, and after he had looked and had seen no car approaching on Fayette street, he had the further right to cross the tracks and to assume that he would not be recklessly run down. In exercising these rights he did precisely all that a cautious and prudent man would have done under like conditions. This is all the evidence of contributing negligence which the record discloses, the defendant having adduced no evidence at all. There is no such distinct, prominent and decisive fact proved, about which ordinary minds would not differ, as to justify the Court in pronouncing the plaintiff's conduct such contributing negligence in law as would preclude him from recovering. Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the Court to determine its quality as matter of law. *Fitzpatrick's case*, 35 Md. 32; *Dougherty's case*, 36 Md. 366; *Miller's case*, 29 Md. 252; *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53; *Van Steinburg's case*, 17 Mich. 99.

For the reasons we have given, we think this case, upon the plaintiff's showing, ought to have been submitted to the jury, and hence there was reversible error in withdrawing it from their consideration. The judgment will accordingly be reversed and a new trial will be awarded.

*Judgment reversed with costs above  
and below, and a new trial awarded.*

(Decided March 1st, 1895.)

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Syllabus.

MARTIN L. PATTISON vs. ROBERT H. HUGHES,  
EXECUTOR, ETC.*Striking out Judgment when Defendant not Summoned.*

Upon a motion to strike out a final judgment by default, the evidence showed that the defendant, although returned summoned, had not in fact been summoned; that he had some indefinite knowledge that he had been sued, and attempted in good faith to find out who had sued him and for what cause, but was informed by the plaintiff's attorney that "it was all over." *Held*, that the judgment should be struck out.

Appeal from the Circuit Court for Howard County. The case is stated in the opinion of the Court.

The cause was submitted on briefs filed by *Thomas S. Hodson* and *Edward S. Kines* for the appellant, and *James Mackubin* for the appellee.

FOWLER, J., delivered the opinion of the Court.

On the 30th of August, 1893, the late Henry E. Wooten, as attorney for the appellee, directed a summons to be issued against the appellant from the Circuit Court for Howard County, to answer an action at the suit of the appellee, as executor of Robert L. Ewing. The summons was duly issued and the appellant was returned "summoned" on the second of September. No other proceedings were taken in the cause until the 19th March, 1894, when Mr. James Mackubin entered his appearance as attorney for the appellee, and filed, for the first time, a declaration, consisting of the common counts—the suit having been originally brought on titling. On the 18th June, 1894, being the first day of the June term, a judgment by default was taken by the plaintiff against the defendant, and the same day it was extended, upon proof before the Court, for two hundred and fifty-seven dollars. Several months thereafter, on the 24th November, and as he alleges, within three or four days of the time when he first heard of either the suit or the judgment, the appellant filed a motion to strike out

the latter, first, because the summons was not served on him and he had no notice of the suit or any opportunity of defence; second, because he had no notice of the suit or judgment until the 20th Nov., and proceeded without delay to file his motion; and lastly, because he is not indebted to the plaintiff in any sum whatever, and had a perfectly good defence, of which he would have availed himself if an opportunity had been given him. In support of his motion the appellant relied upon the testimony of four witnesses, himself, his wife, his son and a neighbor, Mr. Earp. The latter was not present when the deputy sheriff called at the appellant's house, but the others all swear in the most positive manner that the officer was drunk on that occasion. The defendant says "he was drunk; he fumbled around in his pockets as though he were looking for a paper; he took no paper out, nor did he read any to me, nor did I have any paper in my hand. He turned to go away, and I said to him, what is this for, and he said, I don't know. Whereupon he got in his carriage and went away." The appellant's wife says that her attention was first called to the deputy sheriff by one of the little children, who said to her, "Come and see the funny drunken man," when she went to the door and heard the officer say to her husband, "I want you to come to Ellicott's City." She did not remember the day he told him to come; her husband asked what for, and he said, "I don't know." The son says the officer was drunk and acted like a drunken man. To use the language of the witness, "He was drunk, for no sober man would act as he did; and he said to my father, 'I want you to come to Ellicott's City.' I don't remember what day he told him to come and where and when it was, sometime in September. Father asked him what he was to come for, and the officer told him that he did not know, and he produced no papers."

There is not one word to contradict the above testimony in regard to the condition of the deputy sheriff while he was thus attempting to perform his official duty, although

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he was himself called by the appellee to testify. There being then a substantial admission that the officer, who is alleged to have served the summons, was in the condition testified to by the witnesses whose testimony we have just recited, his official acts cannot be received with that respect nor have that *prima facie* verity which, by the well-settled rule of law, would otherwise be accorded them. He does testify that he called on the defendant. He says, "I don't remember the time; I don't keep any papers. I remember going there a rainy day and serving a summons on Mr. Pattison. I can't even state the year. I told him that I had a summons for him. I told him whose it was. It was raining that day, and I told him to take it in the house and read it; he said that was all right. Then I returned him summoned. That is all I know about it that day." It appears, therefore, from the overwhelming weight of evidence, that the appellant was not summoned. However, having learned that he was wanted at Ellicott's City, in September he went there, and finding the officer, and no doubt anxious and hoping to get some definite information, he again asked for it. The only testimony as to what took place at this interview between the appellant and the deputy sheriff, is that of the latter. He says, "The next time I saw Mr. Pattison was in the Court-room up here. He asked me about the bill that I summoned him on, and I told him that I knew nothing about it; that Mr. Vansant had it, as he kept the papers. He said that he was going to see Mr. Wooten; that is all the conversation I had with Mr. Pattison that day." And it appears that the appellant at once proceeded to call on Mr. Wooten, whom he found in the Court-room. He says, "I met Mr. Wooten. I said, Mr. Wooten, do you know what I am here for? And he said, yes. It is all over now—go home, Pattison." This interview took place in September, and the *nar.* was not filed for six months thereafter—Mr. Wooten having died in the meantime, and the judgment was not entered until the 18th June—some nine months after the appellant had been informed that "it was all over." And

then, when we remember that it was the attorney of the appellee who gave this information to the appellant, it seems to us almost unnecessary to say anything more than that in our opinion he was, under all the circumstances of this case, justified in not making any further investigation. Assuming, though we think it extremely doubtful from the evidence, that the appellant had some indefinite sort of knowledge that he had been sued, yet, having attempted in good faith to find out what the suit was about and who had sued him, and having been informed by the plaintiff, or what amounts to the same thing, by his attorney, that "it was all over," he was not required to appear to the suit, even if he had had much more definite information and notice than he appears to have had.

There is no question here of bad faith on the part of the appellee or his attorney, but that the appellant had a right to assume, after his conversation with Mr. Wooten, that the business, case, or whatever it might be, was over and ended, is too clear for controversy. And this being so, it is equally clear the relief asked should have been granted. Common justice concedes to every man his day in Court.

*Order reversed and cause remanded  
that the judgment may be stricken  
out.*

(Decided March 1st, 1895.)

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Syllabus.

CHARLES SCHAEFFER *vs.* FARMERS' MUTUAL  
FIRE INSURANCE COMPANY OF DUG HILL,  
CARROLL COUNTY.

*Fire Insurance—Forfeiture of Policy—Increased Risk—Use of Steam Engine—Notice to Insurer—Examination of Premises—Unsigned Bill of Exceptions.*

When payment of a loss insured against is resisted on the ground that the policy was forfeited, the insurer must show both that the policy in express terms, or by clear implication, contains some provision forfeiting the policy in specified contingencies, and also that the insured has brought himself within the scope of such provision.

A policy of fire insurance in a mutual company covered certain farm buildings, tan shop, bark shed, etc. On the day of the loss an engine was stationed on the premises about fifty feet from the bark mill, and used for the purpose of grinding bark. The engine had been used once a month for this purpose for more than a year and a half previously. While the engine was not running a fire broke out in the bark mill and consumed the tannery buildings and the stock in trade, but there was no evidence to show the origin of the fire. The policy prohibited the use of any steam engine temporarily employed for the purpose of threshing out crops of any kind. *Held*, that the use of an engine for grinding bark was not within the above cause of forfeiture.

Another clause of the policy provided that in the event of an engine being stationed on the premises in proximity to the buildings insured, then the president of the company should appoint a committee to examine the same and ascertain the amount of the increased risk, and, if increased, an additional premium note should be given by the insured. Ten days before the fire the insured notified the defendant's general agent that he was using the engine as above stated, for grinding bark, and that he was willing to do or pay anything necessary for the protection of the property. The agent refused to give a permit for the use of the engine, and no committee to examine the premises was appointed. *Held*,

1st. That the employment of the engine did not necessarily result in a forfeiture of the policy, but if the risk was thereby increased, and no additional premium note was given, the insurer would be released from liability, unless it had neglected for an unreasonable time to make the examination provided for.



2nd. That it was the duty of the insurer to appoint a committee to ascertain forthwith whether the risk had been increased by the use of the engine, and a failure to do so for an unreasonable time after said notice, was no defence to plaintiff's right to recover.

3rd. That the notice to the general agent was notice to the company, it being his duty to communicate it, and the refusal of the agent to give the permit asked for made no difference, because no permit was needed.

4th. That whether the period between the date of the notice and the occurrence of the loss was a reasonable time within which the committee ought to have been appointed, was a question of fact for the jury.

5th. That if this was a reasonable time, and the risk was increased by the use of the engine, and loss resulted therefrom, the company would still be liable, because it could not rely upon the failure of the plaintiff to give an additional premium note, when that failure was due to the company's neglect to examine the premises.

6th. That if the use of the engine increased the risk, and no additional note was given, the right to recover would not be defeated, unless the loss occurred from that increased risk, and this was a question of fact for the jury.

7th. That if the use of the engine did not increase the risk, then the policy would not be affected.

The above policy also provided that it should be forfeited in the event of alterations in the premises which increase the risk, or the use thereof for carrying on any trade which, according to the by-laws and conditions, class of hazards and rates annexed to the policy, would increase the risk. *Held*, that the use of the engine, as above stated, was not an alteration in the insured premises, and that it was not a carrying on of a trade which, according to the by-laws, &c., increased the hazard, because the by-laws do not so declare, and because there was no class of hazards annexed to the policy.

Where there is no forfeiture of the policy there can be no waiver of forfeiture, and hence evidence and prayers relating to the question of waiver are properly rejected.

Notice to a general agent of an insurance company is notice to the company.

Where an unsigned bill of exceptions is connected by apt reference in a succeeding bill, the Court will consider its recitals of facts, but not the ruling excepted to.

Appeal from the Circuit Court for Carroll County. The case is stated in the opinion of the Court. The policy sued on provided "that in case the above mentioned premises

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shall at any time, after the making and during the time this policy would otherwise continue in force, be so altered, or be appropriated, applied or used, to or for the purpose of carrying on or exercising therein any trade, business or vocation, which, according to the by-laws and conditions, class of hazards, or rates hereto annexed, would increase the hazard, unless it be by the consent and agreement in writing of this corporation added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be appropriated, applied or used, this policy shall cease and be of no force or effect."

The sixteenth and seventeenth conditions of insurance in the policy are as follows:

16. This company will not become responsible for any loss or damage by fire to any property insured in this company, resulting from the use of any steam engine temporarily employed for the purpose of threshing out crops of any kind.

17. That in the event of an engine being stationed on the premises, and in close proximity to the buildings insured by this company, then, in that event, the president of the company shall appoint a committee of three discreet men, who shall be members of the company, who shall proceed forthwith to said property to make a fair and impartial examination, in order to ascertain the amount of increased risk on account of said engine; and if they shall find that the risk is increased thereby, then they shall take an additional premium note for such increase, upon which the assured shall pay ten percentum at the time of the execution, and said note to be subject to the same assessments as other notes of said company, to meet losses by fire happening to property insured by this company. The expenses of the committee to be paid by the assured.

The plaintiff's first, second and third prayers related to the question of waiver. His other prayers were as follows:

*Plaintiff's 4th Prayer.*—That if the jury shall find from all the evidence that the general agent of the defendant

company had knowledge of the use by the plaintiff of an engine at the tannery of the plaintiff, mentioned and set out in the policy of insurance before the time of the fire, to-wit, on February 17th, 1892, if they shall so find, then the knowledge of the general agent is the knowledge of the defendant company.

*Plaintiff's 5th Prayer.*—That if they shall find that the general agent of the defendant company had knowledge before the loss by fire offered in evidence, that the plaintiff was using and had been using an engine at the tannery of the plaintiff, if they shall so find; and shall further find that the policy of insurance had not been cancelled by the defendant company until after the fire, to-wit, on the 16th day of September, 1893, if they shall so find, then the jury may find that the defendant company assented to the use of said engine.

*Plaintiff's 6th Prayer.*—That the true construction of the contract offered in evidence is, that if the jury shall find that the general agent of the defendant company had knowledge on February 17th, 1892, that the plaintiff was using and had been using for a year or more an engine at the tannery of the plaintiff insured in said policy of insurance, if they shall so find; and shall further find that defendant company did not cancel said policy of insurance until the 16th day of September, 1893, if they shall so find, then the defendant company assented to the use of said engine, even though they may further find that defendant company, by its resolution of March 19th, 1892, if they shall so find, declined to pay said loss.

*Plaintiff's 7th Prayer.*—That if the jury shall find from the evidence in this cause that a policy of insurance was issued to the plaintiff by the Carroll County Mutual Fire Insurance Company in March, 1887, on the property of the plaintiff; and shall further find that said insurance was issued under and by the written permission of the general agent of the defendant company; and shall further find that before the loss sued for in this case, and since the insur-

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ance was effected in the Carroll County Mutual Fire Insurance Company, the plaintiff paid to defendant company three (3) or four assessments on his premium note, if they shall so find, then the defendant company is estopped from setting up the insurance in the Carroll County Mutual Fire Insurance Company, if they shall so find, as a defence to this action.

The defendant's second prayer was: "That if the jury shall find that the plaintiff's tannery was insured in the defendant company, as set out in the policy of insurance offered in evidence; and shall further find that the defendant, on the 17th day of February, 1892, applied to the general agent of the defendant company for a permit to use a steam engine, for the purpose of grinding bark at his said tannery, and was told by said agent that a permit for said purpose would not be granted to him; and shall further find that, notwithstanding said refusal to grant him a permit for the purpose aforesaid, the plaintiff engaged a portable steam engine, and had the same in use on the 27th day of February, 1892, and had so used said engine for more than a year prior thereto to do grinding of bark at said tannery; and shall further find that said engine was, when in use as aforesaid, stationed within fifty feet, or thereabouts, from said tannery on said day, and that the same was connected by means of a strap and pulley to machinery in said tannery, for grinding bark, as mentioned in the evidence; and shall further find that said engine was being used on the day of said fire, for the purpose of grinding bark as aforesaid, then the plaintiff is not entitled to recover."

The Court below (ROBERTS, C. J.), rejected all of the prayers of the plaintiff, and granted the second prayer of the defendant; and the verdict and judgment being for the defendant, the plaintiff appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

*Harry M. Clabaugh and George R. Gaither, Jr., (with whom were John M. Roberts and Jos. D. Brooks on the brief), for the appellant.*

*James A. C. Bond for the appellee.*

The facts of this case so closely resemble those of the *Hull case*, 77 Md. 500, that any attempt to distinguish them must fail. The following facts appear in this record: The plaintiff, as the owner of a tannery and bark mill (where bark for the tannery was ground being same building), had for one year and a half used this same engine for the purpose of grinding and preparing his bark. That on the day of the fire he *stationed it within 50 or 60 feet of his bark mill and tannery* (the limit of the strap) and began operating the mill by means of said strap and pulley connected with the engine. Began grinding bark about 8 o'clock in the morning of the day of the fire, with 75 to 90 pounds of steam, and ran the engine till little after 11 o'clock of that day, when it was stopped for dinner. When they stopped for dinner, left the engine with fire in grate and about 50 or 60 pounds of steam on. No one was left with engine when they went to dinner, and no one present when fire occurred, which consumed the mill and tannery. The fire occurred about one-half hour after they left for dinner and whilst they were at dinner. The distance of the dwelling house, where they were at dinner, from the mill and tannery, was 150 yards. The foregoing are the undisputed facts of the case as shown by the plaintiff himself, his manager, Hesson, and his man Hoppie operating the engine on day of fire. Did the plaintiff have the permission of defendant to use the engine on that day? It appeared in the *Hull case* that he did not have the permission and did not ask for it. In this case the plaintiff says he asked for such permission of Joseph Shaeffer, the general agent of the defendant, the day after *Hull's* fire, but that said agent *refused to give it*. And the agent says that he not only refused the permission asked for, but assigned as the ground of his re-

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fusal that grinding bark "came under the head of manufacturing," and he could not give it.

Hence it will be found that every condition of fact is present in this case which appeared in the other. The action is against the same company, on a similar and identical policy, for a loss occasioned by the same engine (ten days apart), stationed about the same distance from the buildings, under like circumstances and used by plaintiff in disregard of the terms of his contract and against the *explicit refusal* of the defendant to grant him the privilege of so using it. The parallel is complete. And so the Court below, following the authority of the previous case and precedent, gave directions to the jury in conformity with it by granting defendant's 2nd prayer, and thus determining the rule of law by which the case should be governed. All the other questions sought to be raised in the progress of the case were and are of an unimportant and undecisive character and of minor consequence. There was but one single question in the case, and that was of controlling importance, which was the one passed on by the Court, as before stated.

I might advert to the question of waiver raised, but that also has been so authoritatively discussed in the case referred to, that it would be useless to recapitulate the argument and cite authorities. Hull paid the assessment before bringing suit; this plaintiff did not pay until after he had brought suit, which he did on the 24th day of May, 1892, having full knowledge at the time of the resistance on part of the company of his claim, to the extent of requiring suit to be brought.

*Chas. T. Reifsnider* and *Chas. T. Reifsnider, Jr.*, also filed a brief for the appellee.

McSHERRY J. delivered the opinion of the Court.

The appellant's tannery, bark-mill and stock in trade, which, with other property owned by him, were insured under one and the same policy issued by the appellee, were destroyed by fire on February the twenty-seventh, 1892.

Due preliminary proof of loss was made, and subsequently suit was brought upon the policy to recover the amount of insurance written on that portion of the property which had been burned. During the progress of the trial in the Circuit Court for Carroll County, five exceptions were taken. The second one of these, though it appears in the record, was not signed by the Judge. It cannot, therefore, be considered by us beyond its recitals of facts. These, by reason of the unsigned bill of exceptions being connected with the succeeding one, form part of the latter. *Cooper v. Holmes*, 71 Md. 20. The first, third and fourth bills of exception relate to questions of evidence, and the fifth to the several prayers presented by both parties. The verdict and judgment were against the plaintiff and he has appealed.

It will obviate much unnecessary discussion if we proceed at once to an examination of the fundamental and controlling questions involved in the controversy, instead of considering separately the several exceptions in the order in which they appear in the record.

The defendant resists the claim of the plaintiff on the ground that the unauthorized use by the plaintiff of a steam engine located about fifty feet away from the bark mill, but connected with the machinery in the latter by a leather band, worked a forfeiture of the policy under the terms and conditions set forth therein and endorsed thereon. And it relies in support of this position on the recent case of *The Farmers' Mut. Fire Ins. Co. v. Hull*, 77 Md. 498. On the other hand the plaintiff insists, first, that the use of the steam engine for the purpose of grinding bark did not cause a forfeiture; and, secondly, that even if a forfeiture did occur, the defendant unequivocally waived it.

It can scarcely be necessary to reaffirm what has been so often and so uniformly decided, that forfeitures by mere implication are never favored in the law. A company which resists, on the ground of forfeiture, the payment of a loss against which it has insured, must show both that its policy or written contract contains, either in express terms or by

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clear implication, some provision forfeiting the policy in specified contingencies; and also that the insured has brought himself within the scope and conditions of that provision. The policy is a contract between the insurer and the insured, and as they have written it, and not otherwise, so Courts must construe and enforce it. To the policy, then, and to all that forms a part of it, must resort be had to ascertain not only whether a forfeiture is in fact provided for, but the conditions and circumstances under which it becomes applicable and effective.

In the body of the policy now before us there are two causes of forfeiture; and in the conditions of insurance thereto annexed and in the by-laws, made a part thereof by reference, there are three more. Those first alluded to relate, the one to the taking out by the insured, without notice to the insurer, additional insurance on the same property in a different company; and the other, first, to alterations of the premises, and secondly, to their use for the purpose of carrying on therein any trade or business "which, according to the by-laws and conditions, class of hazards or rates hereto annexed, would increase the hazard," unless by the consent of the insurer endorsed upon the policy. Those set forth in the conditions are, first, alterations made in any building which increases the risk; secondly, the omission for thirty days after demand to pay any assessment levied on the assured's premium note; and thirdly, the sixteenth condition, which, without qualification, prohibits the use of "any steam engine temporarily employed for the purpose of threshing out crops of any kind."

Under the policy sued on, which was issued in February, 1887, and covered a period of seven years, the appellant's dwelling-house, household furniture, tenant-house, wagon-shed, barn, hay-shed, and other farm buildings and farming implements, together with his tan-shop, bark-shed, bark-mill house, stock in trade, consisting of bark, hides, leather, finished and unfinished, were all insured. The engine used on the premises the day of the fire was not located at the



barn or employed for the purpose of threshing out crops of any kind, but was stationed between fifty and sixty feet away from the bark-mill house and was, and for more than a year and a-half previously had been used once a month to furnish the motive power for grinding bark for the plaintiff's tannery. On the day of the fire the engine was in use for grinding bark, and whilst the employes were at dinner and the engine was not running and its fires were banked, a fire broke out in the bark-mill house and consumed the tannery buildings and stock in trade. When first discovered the fire was within the building, whose sides towards the engine were tightly weatherboarded and stripped. Earlier on the same day a slight fire broke out about the same spot, but was promptly extinguished. There was evidence tending to show that the first fire was produced by the friction of the machinery, but there is no evidence whatever in the record to show what caused the second and destructive fire.

It is not pretended that the first of the two causes of forfeiture set forth in the body of the policy, and the second of those contained in the conditions and by-laws, have any relation to the case at bar. There was other insurance in a different company, but it was taken out only after notice had been given to, and a written permit had been procured from, the general agent of the defendant. The third of the causes of forfeiture contained in the conditions, being the one numbered sixteen, was the one under consideration in *Hull's case*. Hull stationed a portable engine within thirty feet of his barn, and connected it by a strap and pulley with machinery in the barn, and used it there in chopping and threshing his grain. The barn was destroyed by fire whilst the engine was so used, and we held that the policy, which was identical in terms with the policy in this case, and was issued by the same company, though, of course, covering different property, was forfeited. The conduct of Hull was directly within the terms of the sixteenth condition endorsed on the policy, and there was no possible escape from the conclusion that his policy was forfeited thereby, and, hence,

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the only contention in that case was whether the company had waived this forfeiture.

Apart from other provisions of the policy now under examination, it is clear that an engine regularly employed in grinding bark for use in a tannery in the process of tanning leather, is not a "steam engine temporarily employed for the purpose of threshing out crops of any kind," and is not within the sixteenth condition, and is not, therefore, the cause of forfeiture specified therein. It is manifest that this provision was intended to prohibit the use of engines for the purpose of threshing out crops in the vicinity of barns and other equally inflammable farm buildings; and, imposing as it does, a forfeiture for such a use, it must be strictly confined in its application to cases within its terms as written, and is not to be enlarged to include by implication another class of circumstances neither within its letter nor its evident design. In the vital particular that the use made of the engine by the appellant was not a use prohibited or at a place prohibited by the sixteenth condition on the policy, the case at bar is widely distinguishable from *Hull's case*. That condition cannot control this case unless restrictions and inhibitions which are not there now are first imported into it by mere construction.

That this view of the limited scope and effect of the sixteenth condition is the correct one, is made even more apparent, by other and different provisions embodied in the seventeenth condition, which was obviously framed to meet a class of cases not covered by the sixteenth condition. Whilst this latter condition provides without qualification of any sort that "this company *will not become responsible for any loss or damage by fire \* \* \* \** resulting from the use of *any steam engine temporarily employed for the purpose of threshing out crops of any kind,*" the seventeenth condition distinctly and in terms recognizes the liability of the company for losses or damage by fire resulting from the use of other steam engines than those referred to in the sixteenth condition, and specifically prescribes what shall be done by

the company and by the insured when such other steam engines are employed ; but it no where imposes a forfeiture. The seventeenth section or condition is in these words : " That in the event of an engine being stationed on the premises, and in close proximity to the buildings insured by this company, then, in that event, the president of the company shall appoint a committee of three discreet men, who shall be members of this company, who shall proceed forthwith to said property to make a fair and impartial examination, in order to ascertain the amount of increased risk on account of said engine ; and if they shall find that the risk is increased thereby, then they shall take an additional premium note for such increase, upon which the assured shall pay ten percentum at the time of the execution, and the said note to be subject to the same assessments as other notes of said company, to meet losses by fire happening to property insured by this company." The plain meaning of this is, that if an engine other than those referred to in the sixteenth condition is stationed on the insured premises, ascertainment shall be made in the method pointed out, whether the risk has been increased thereby or not ; and if it be found that the risk has been increased, then it is provided, not that the policy shall be forfeited, but that an additional premium note shall be given upon which ten per cent. must be paid ; but if it be found that the risk has not been increased, then neither is the policy forfeited, nor is an additional premium note demandable. The employment, therefore, of such an engine as the seventeenth clause contemplates, does not result under its terms in a forfeiture of the policy or even necessarily in increasing the risk ; but if the risk be increased by the use of such an engine, and loss by fire is occasioned thereby, then the insurer, in the event that no additional premium note has been given, will be released from liability under the policy unless it has neglected to appoint the committee and to make the examination provided for ; but, if thus released, it would be upon altogether different principles. It would

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be released, if released at all, because it is the settled law, even in the absence of an express provision on the subject in the policy, that when the erection by the insured of an adjacent building, and, of course, the use by him of an adjacent steam engine, has caused a material increase of risk by fire to the property insured, and when the loss was produced by such increase of risk, a recovery on the policy would be denied. *Wash. Fire Ins. Co. v. Davison and Symington*, 30 Md. 102. Under this seventeenth clause it becomes the imperative duty of the president of the company, when a steam engine has been stationed on the premises in close proximity to the buildings insured, to appoint a committee of three members of the company to examine forthwith whether there has been an increase of risk on account thereof. Good faith towards and frank dealing with the assured, no less than the explicit words of the provision itself, require that this duty should be discharged, if not "forthwith," upon the company being apprised of the existence of the conditions on which its performance depends, at least with due and proper diligence thereafter. Obviously a failure for an unreasonable time after notice to do that which it is the company's plain duty to do forthwith, offers no defence to a plaintiff's right to recover.

The record shows that ten days before the fire the plaintiff notified the defendant's general agent, whose duty it was to attend to all its business in his territory, that he, the plaintiff, was then using the engine for grinding bark, and that he was willing to do and to pay anything that might be necessary for the protection of the property in the event of fire, and that he wanted to be made safe in his insurance on the tan-yard. This was notice to the company. *May on Insurance*, sec. 152; *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222. We are not dealing with the question of the agent's power or authority to waive or vary a condition of the policy, but only with the proposition that notice of the character we are considering given to the general agent of the company is notice to the company itself. And it was

notice to the company because it was the duty of the agent to communicate it to his principal. It can make no possible difference that the agent when so notified declined to give a permit for the use of the engine, because under the seventeenth condition no permit was needed, but another method was provided. Whether the period that elapsed between the date of this notice and the subsequent fire was a reasonable time within which the company ought to have appointed the committee of three members under the seventeenth condition, was a question of fact for the jury to determine under all the attendant circumstances. *Rokes v. Amazon Ins. Co.* 51 Md. 519. Under this seventeenth clause, whilst there was no forfeiture declared or even implied, there are two contingencies presented. There is the contingency that the use of the engine would increase the risk under which two different aspects are presented; and there is the opposite contingency that it would not. In the latter event the policy would in no way be affected, and the right to recover on it would not be impaired. In the event that the risk was materially increased and no additional premium note was given, then the right to recover was not defeated unless the loss occurred in whole or in part from that increased risk; and this is a question of fact for the jury to find. If, again, the risk was materially increased and notice was given to the company and no additional premium note was given, solely because of unreasonable delay on the part of the company in making an examination to ascertain the amount of the increased risk, and loss resulted by fire occasioned by such increased risk, still the company would be liable, because it would not be permitted to invoke in its defence the failure of the plaintiff to give an additional premium note when that failure was due exclusively to the company's own omission or neglect to perform its precedent duty within a reasonable time. In no view, then, that can be taken of the sixteenth and seventeenth clauses, was there a forfeiture of the policy.

The remaining causes of forfeiture stated in the policy and in the conditions thereto annexed, are those which

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relate to alterations in the premises or buildings which increase the risk and to the use thereof for the purpose of carrying on therein any trade or business, which, according to the by-laws and conditions, class of hazards and rates annexed to the policy would increase the hazard. There is no evidence that there were alterations made in the premises or buildings after they were insured. When the policy was issued the buildings used in the tannery business were described in the policy, and distinctly insured as buildings pertaining to that occupation, and it is not intimated that they were used thereafter for the purpose of carrying on any different trade or business. Nothing, then, in the structures themselves, or in the business conducted therein, was changed or altered after the insurance had been granted; and unless placing and operating the engine fifty or sixty feet away from the bark-mill house amounted to an alteration in the insured premises, or to a use of them for carrying on a trade, which, according to the class of hazards and rates annexed to the policy, would increase the hazard, there is nothing in either of those provisions which has the slightest reference to the case at bar. That the engine so placed and so operated did not amount to an alteration in the insured premises in the sense in which the terms used in the policy are invariably interpreted can admit of no doubt. Those terms mean an alteration in the thing insured. *Washington Fire Ins. Co. v. Davison and Symington*, 30 Md. 102. That an engine employed as this one was, was not a use of the premises for carrying on a trade or business, which, according to the by-laws and conditions, class of hazards and rates annexed to the policy, would increase the hazard, is equally free from doubt, because the by-laws and conditions do not expressly or impliedly so declare, and because there is no class of hazards or rates annexed to the policy at all. There is consequently no standard as to what would increase the risk, furnished by any by-law, condition, class of hazards or rates. To avoid any misunderstanding, we repeat that if without notice to the insurer the use of

the engine as described did in fact materially increase the risk, and if the loss was occasioned by that increased risk, the insurer would be relieved from liability. But these are facts to be found by the jury.

As there was no forfeiture of the policy, there could be no waiver of a forfeiture that never existed, and hence the evidence offered and objected to in the first, third and fourth exceptions tending to prove a waiver was irrelevant, and was for that reason properly excluded. The plaintiff's first, second and third prayers, which were confined to the question of waiver, were also properly rejected, because there was no question of waiver involved, and there could be none where there had been no forfeiture. The fifth and sixth prayers were wrong and were properly rejected. As there was no forfeiture, there was no right in the company to cancel the policy, and a delay in an abortive cancellation was of no consequence one way or the other, as respects the plaintiff's right to recover. The fourth and seventh prayers were right, and ought to have been granted. The fourth has relation to the knowledge of the agent being the knowledge of the company; and the seventh refers to the insurance in a different company. All of the defendant's prayers except the second were rejected, and that one ought to have been refused. Its vice is that it construes the policy to mean that the use of the engine under the circumstances stated of itself, forfeited the policy. We have already discussed that question and have reached a different conclusion.

For the error in rejecting the plaintiff's fourth and seventh prayers, and in granting the defendant's second, the judgment must be reversed and a new trial will be awarded.

*Judgment reversed with costs above  
and below, and new trial awarded.*

(Decided March 1st, 1895.)

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Syllabus.

## ANTOINE F. BADART vs. THERESE CATHERINE FOULON.

*Contract in Foreign Language—Meaning of Words a Question of Fact—Admissions of Agent—Merger of Antecedent Negotiations in Contract—Delivery of Contract—Prayer Assuming a Fact.*

Where the contract sued on is in a foreign language, the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language; and the original contract is admissible in evidence, together with the translations of the witnesses. Where there are two or more versions, it is for the jury to determine which one is correct.

A document in which a party describes himself as agent of the plaintiff is not admissible in evidence on the offer of the defendant, unless there is evidence that such party was authorized to contract on behalf of the plaintiff; and it is irrelevant to inquire whether the plaintiff had an opportunity to object to it or not.

Where the parties have put their whole agreement in writing, no evidence of antecedent letters and negotiations is admissible.

A prayer assuming a fact which ought to have been left to the finding of the jury must be specially excepted to.

Where defendant's own testimony shows that he had signed a certain contract; that it was in the plaintiff's possession with his knowledge; that he had received plaintiff's money under it; that he had written her a letter suggesting a modification of it; that he had paid money under it to her agent, he cannot be allowed to deny that the contract had been delivered.

Appeal from the Superior Court of Baltimore City. This was an action for money lent. The declaration contained four of the common counts, and a special count, setting forth "that the defendant, by his written contract, dated April 20th, 1889, for and in consideration of the loan of \$10,000, agreed with the plaintiff to repay the said sum, with interest, two years after date, upon certain terms and conditions therein fully set forth," and concluding with a general averment of the performance of all things necessary to be done by the plaintiff, and the defendant's neglect and



refusal to pay the \$10,000, with interest. The defendant pleaded the general issue, and the plaintiff obtained a verdict and judgment for \$8,951.77. The contract sued on was written in French. The defendant contended that its legal effect was to create a partnership between the parties, while the plaintiff contended that the transaction was merely a loan, which, not having been paid at maturity, was recoverable in this action. The contract recited that the plaintiff, Madame Veuve Foulon, of Brussels, had handed over to the defendant, Badart, the sum of \$10,000 to be used exclusively in the operation of a cotton seed oil refinery at Baltimore; that "as a remuneration for the capital brought in" by her, or according to another translation, "in consideration of the contribution to the capital," (*pour prix de l'apport fait par la contractante*.) the defendant yielded to the plaintiff twelve and one-half per cent. of the net annual profits of the business for the term of six years "from the date of the loan," or, according to the other translation, "from the date on which this advance money is paid (*prenant cours de la date du prêt pour expirer six ans après*.) Other provisions concerned monthly reports of the business; the assignment to the plaintiff of a policy of life insurance, &c. The main controversy was as to the proper translation of the third article of the contract, which was as follows:

Art. 3. La somme de dix mille dollars, ci dessus nommée portera intérêt à raison de six pour cent l'an lesquels intérêts seront payables de six mois en six mois; le premier paiement se faisant le trente Juin prochain pour la partie de semestre non expiré et ensuite comme établi ci dessus. Toutefois si la part des profits appropriée à Madame Foulon excède en valeur le montant des interets, ces derniers seront considérés comme un à compte sur le montant de la dite part des profits. Le capital sera remboursable deux ans après la date du prêt.

The plaintiff's witness, Prof. Bonnotte, translated this clause as follows: "Art. III. The above-mentioned sum of

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ten thousand dollars will bear interest at a rate of six per cent. a year, which interests will be paid every six months; the first payment being made on the 30th of next June for the running half year, and after that, as prescribed above. Nevertheless, if the share of profits which is appropriated to Madame Foulon exceeds in value the amount of interests, these interests will be considered as a part of above-mentioned share in the profits. The capital will be reimbursable (means must be paid back) two years after date of loan." The defendant's witness, Mr. Rabillon, translated the same thus: "Art. 3. The amount of ten thousand dollars above-mentioned shall bear interest at the rate of six per cent. per annum. This interest will be payable every six months; the first payment to be made on June 30th next, for that portion of the half year not expired, and thereafter as decided above. Should the share in the profits, however, exceed in value the amount of the interest, the said interest shall be considered as so much on account of the said share in the profits. The principal will be redeemable two years after the date on which it was received."

The case is further stated in the opinion of the Court. The defendant offered the following prayers:

*Defendant's 1st Prayer.*—The jury are instructed that the plaintiff has offered no evidence legally sufficient to entitle her to recover under the issues joined in this case, and therefore that under the pleadings and all the evidence in the cause, their verdict must be for the defendant. (Rejected.)

*Defendant's 2nd Prayer.*—If the jury shall find that the defendant and the witness Schelfhoudt executed the contract of May 26, 1888, offered in evidence, and that the plaintiff at the time of the alleged execution of the contract offered in evidence by her, knew of the existence of this contract with Schelfhoudt, or had such notice in regard to its existence as would have put an ordinarily prudent person upon enquiry in relation thereto, then the jury are instructed that the plaintiff has offered no evidence legally sufficient to enable her to recover in this action, and under the pleadings

and all the evidence in the cause, their verdict must be for the defendant. (Rejected.)

*Defendant's 3rd Prayer.*—The jury are instructed that they are entitled to pass upon the credibility of the testimony of the plaintiff and of her witness, Schelfhoudt, and if they shall not believe the testimony of the said witness as to any alleged facts regarding which no other evidence has been offered by either party, then they are entitled, if they shall see fit, to disregard so much of the said testimony as relates to the facts last mentioned. (Granted.)

*Defendant's 4th Prayer.*—If the jury shall find that the plaintiff received the letter of October 14th, 1890, produced in evidence by her, and made no reply thereto, and that she never informed the defendant, either personally or otherwise, that she disavowed or objected to anything in the said letter contained, and shall further find that no demand for the sum of \$10,000, mentioned in the alleged contract of April 20th, 1889, was made upon the defendant on April 1st, 1891, or at any time thereafter prior to the institution of this suit, then the jury are entitled to find, if they see fit from all the evidence in the cause, that the plaintiff assented to the terms of the said letter, notwithstanding her own testimony on this subject; and if the jury shall find such assent on her part, then, under the pleadings and all the evidence in the cause, their verdict must be for the defendant. (Rejected.)

*Defendant's 7th Prayer.*—If the jury shall find from the evidence that the witness Schelfhoudt has paid to the plaintiff any sum of money, either on account of the principal of the sum of \$10,000 mentioned in the contract of April 20th, 1889, or as interest thereon, then, under the pleadings and all the evidence in the cause, the jury will deduct the amount of such payment from any verdict which they might otherwise render in favor of the plaintiff in this cause. (Granted.)

*Defendant's 8th Prayer.*—The jury are instructed that the contract of April 20th, 1889, offered in evidence by the

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plaintiff, is not binding upon the defendant unless it was either delivered to the plaintiff personally or to an agent of the said plaintiff authorized to receive it, by the defendant personally or through an agent authorized to deliver it, and unless the jury shall find such delivery, then, under the pleadings and all the evidence in the cause, their verdict must be for the defendant, but the jury are further instructed that possession and production of the said contract by the plaintiff is *prima facie* proof of its delivery. (Rejected.)

*Court's Instruction in Lieu of Plaintiff's Prayer.*—If the jury believe from the evidence that the plaintiff and defendant executed the contract offered in evidence and dated April 20th, 1889, and that the defendant, at the end of two years from the first of April, 1889, failed and refused to pay the sum of \$10,000 mentioned therein, and has ever since so failed and refused, then the plaintiff is entitled to recover the said sum of \$10,000, together with interest thereon from the first of April, 1889, at six per cent., less such sum or sums as the jury may find from the evidence have been paid to or received by said plaintiff on account of the same.

The Court below (RITCHIE, J.), rejected the defendant's first, second, fourth and eighth prayers, and granted an instruction of its own in lieu of the plaintiff's prayer; to which action of the Court the defendant excepted.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Charles J. Bonaparte*, for the appellant.

It is apparent that the difference in the construction of the contract between the two parties, so far as this is vital to the question at issue in this case, turns very largely upon the sense to be given to two words; namely, the French words *pret* and *remboursable*, both found in Article 3 of the contract. At the same time there is something more involved than a mere question of interpretation of these two words, for, according to the testimony of both experts, the

contract is inartificially drawn, and various words are used in it in a loose and inaccurate sense. The literal translation, therefore, of the two words in question, is not decisive of the admissibility of the contract in evidence, since, even if it be conceded that the Court was right in holding, as it must have held, that the plaintiff's interpretation of these two words was the correct one, still their inconsistency, if so understood, with the general sense of the instrument, and with other words which it contains, might be such as to control their strict or usual meaning.

In the second article, in which both *apport* and *pret* are used, it is provided that "as a remuneration for," or "in consideration of," this investment, the plaintiff was to receive from the defendant one-eighth of the net annual profits, for six years after it was made. It is respectfully submitted that this article *constituted the parties to this suit, partners in the enterprise*, made the \$10,000 invested by the plaintiff, a contribution to the capital of the business, deferred her right of repayment to the satisfaction of all creditors of the partnership, and made a Court of Equity the proper and, indeed, the only forum in which this controversy could be adjusted. The use of the word *pret*, in the same and succeeding article, is simply a case of calling a transaction by a wrong name, which, of course, cannot alter its legal character.

According to the plaintiff, while she was to get one-eighth of the clear net profits of the defendant's business during *six* years, she was entitled to demand a return of the \$10,000 which she placed in the defendant's hands, to be used in his business, at the end of *two* years, so that for four years he would continue to pay her one-eighth of the profits, although she contributed nothing, in money or otherwise, towards earning them. According to the defendant's contention, this clause was intended for *his* benefit, and he was authorized to return the plaintiff's capital, and thus escape from all the onerous obligations of this contract, at any time after two years. It is respectfully submitted that the latter contention is so obviously more consonant with the principles

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of equity and common sense, that only the use of unequivocal language would lead the Court to adopt the contrary construction.

*Vernon Cook* (with whom were *Gans & Haman* on the brief), for the appellee.

Comparing the two translations, we find that *Rabillon* construes the contract as a partnership, basing this on the single word *apport*, "capital," which occurs but once. To make the rest of the contract consistent with this view, he gives to *pret*, which occurs twice, an impossible meaning, and gives to *remboursable* a meaning which the parties to the contract never intended. *Bonnotte*, on the contrary, gives *pret* its proper meaning, translates *remboursable* as the parties understood it, and in doing this is not compelled to change *apport* from its natural meaning of "capital," and leaves the mind to infer from the whole contract, as it naturally does, that the capital mentioned is borrowed capital.

The appellant further contends that the contract must be construed as creating a partnership, because of *Mrs. Foulon's* participation in the profits and certain provisions therein contained, giving *Mrs. Foulon* some control over the business; her right to annual balance sheets; to send a representative to look after her interests; and under certain circumstances to seize goods shipped by *Badart*. These provisions are, however, not sufficient to authorize the Court to declare the contract a partnership, when taken in connection with the fact that the ten thousand dollars is declared to be a loan, which must be paid back with interest. The well-settled rule of law now is that a loan or advance of money to be invested in some business or enterprise, the lender to share in the profits as, or in lieu of, interest, does not constitute a partnership. *Am. and Eng. Enc. Law*, vol. 17, page 850; *Lindley on Partnership*, 2d Am. ed. page 16. In such cases, even where the lender has powers of control over the business, more ample than those granted *Mrs. Foulon*, the Courts have held the transaction a loan.

*Mollwo v. Court*, L. R. 4 P. C. 419; *Boston v. Smith*, 13 R. I. 27; *Smith v. Knight*, 71 Ill. 148; *Linter v. Millikin*, 47 Ill. 178; *Lord v. Proctor*, 7 Phila. 630; *Eager v. Crawford*, 76 N. Y. 97; *Curry v. Fowler*, 97 N. Y. 159; *Buzard v. Bank*, 67 Tex. 83; *Bailey v. Clark*, 7 Pick. 372; *Meehen v. Valentine*, 145 U. S. 624.

Where the advance, as in this case, is to be repaid at all events, the intention is to create the relation of borrower and lender and not partnership, as shown by the cases cited above. Then, too, in the contract under consideration, it is agreed by Art. 7 that Badart is to transfer to the name of the plaintiff a policy of insurance upon his life, and that in case of his death the plaintiff is to have from the proceeds of the policy the sum of ten thousand dollars with interest at six per cent. This provision argues most strongly in favor of the view that the transaction is a loan, which must be repaid at all events, and seems quite inconsistent with the appellant's theory of partnership.

The questions presented by the remaining six bills of exceptions are practically these: (1.) Was Schelfhoudt the agent of the plaintiff, and if so, what authority did he have and how far is his correspondence with Badart admissible as evidence against the plaintiff? (2.) Was Edward Badart the agent of the plaintiff, and if so, did he have authority to alter Mrs. Foulon's contract with Antoine Badart? (3.) Is Mrs. Foulon bound to the proposed alterations in the contract on the theory of acquiescence?

The second bill of exceptions is founded on the refusal of the lower Court to admit in evidence a certain writing purporting to be a contract between the appellant and Edward Badart, in which it is recited that Schelfhout and Mrs. Foulon, acting through their agent, Edward Badart, have agreed to certain changes in their previous contracts. The paper is signed by Antoine Badart and by Edward Badart. Before it could be admitted in evidence it was necessary to satisfy the Court that Edward was the agent of Mrs. Foulon, with authority to make such changes. The testimony on

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which the appellant relied for this purpose amounts to nothing more than a bare statement by the appellant testifying on his own behalf that Edward "came in to take the place as agent of Mr. Schelfhoudt and Mrs. Foulon." This, we submit, is not a sufficient or proper way to prove agency. The rule is well-settled that agency must be proved by the words of appointment, or by facts in *pais* tending to show that such a relation existed. *Nat'l Mechanics' Bank v. Bank of Balto.*, 36 Md. 5; 2 *Greenleaf on Evidence*, sections 60 and 65; 1 *Hare & Wallace's Am. Leading Cases*, 568, *Balty v. Carswell*, note.

BRYAN, J., delivered the opinion of the Court.

Therese Catherine Foulon, widow, of Brussels, Belgium, brought suit against Antonie F. Badart. The *narr.* contained the common counts in assumpsit, and also a special count on a written contract. After a jury trial judgment was rendered against the defendant, and he appealed to this Court.

It was shown in evidence that the parties entered into a written contract with each other, which was executed in duplicate signed with their respective hands; and that in consequence of this contract the plaintiff sent to the defendant ten thousand dollars. The plaintiff and Mr. Schelfhoudt, her brother, were examined under a commission; they both described the transaction as a loan of money, and both testified that the defendant was indebted to the plaintiff. The defendant contended that the money was not loaned to him, but that by the written agreement the plaintiff entered into partnership with him, and that the sum of ten thousand dollars was her contribution to the partnership capital. The agreement was in the French language. Two competent interpreters were sworn, who made separate translations, differing from each other in some particulars. According to the testimony of the interpreter examined on behalf of the plaintiff, the transaction was described as a loan, and the money was required to be paid



back two years after the date of the loan. According to the testimony of the interpreter examined on behalf of the defendant, the transaction was described as a "contribution to the capital," and the delivery of the money to the defendant by the plaintiff was called "advance money;" and the principal was redeemable two years after the date on which it was received. After the two translations had been offered in evidence, the defendant moved the Court to exclude the contract from the consideration of the jury.

The Court overruled the motion, and the defendant excepted. This is the first exception. It is undoubtedly the province of the Court to construe all written instruments; but if the language in which they are expressed is not understood by the Court, its meaning must in some way be ascertained before the construction can be determined. The words may have a peculiar and technical meaning; they may be terms belonging to some art, trade or science; they may by commercial or local usage have acquired an unusual signification; or they may be in a foreign language. In all these instances we must of necessity resort to evidence to disclose that which is unknown. The meanings of words are facts, and the jury is the tribunal to decide upon the existence of facts, except under circumstances of a special character, which have no connection with the present question. In *Williams v. Woods*, 16 Maryland, 252, it was held that when the terms of a written instrument are technical or equivocal, parol evidence is admissible to explain their meaning, and that this evidence is for the consideration of the jury; and that the Court must instruct the jury, conditionally or hypothetically, what should be the proper construction of the written instrument, accordingly as they find the meaning of the words from the evidence. There can be no possible reason for a difference in the mode of proving the meaning of unknown words, whether they belong to science, art, mercantile usage, or a foreign language. It is the circumstance that their meaning is unknown, which makes it necessary to have the evidence

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to explain them. And this necessity applies to a foreign language in exactly the same manner as to any other description of unknown words. In *Share v. Wilson*, 9 Clark and Finnely, 355, a question arose about the admission of extrinsic evidence to explain certain terms and phrases contained in the deeds by which Lady Hewley's charities were established. The case was very fully and ably argued in the House of Lords, in the presence of seven of the Judges, whose attendance was requested, and whose opinions were asked by the Lords. The decree was passed in accordance with the opinion of six of the Judges and of Lord Brougham, Lord Lyndhurst and the Lord Chancellor. Three of the learned Judges took occasion to show that where the writing to be interpreted was in a foreign language, there was no difference in the mode of proof from that which prevailed in the ordinary case of unknown words. Mr. Justice Erskine said, "where the instrument is in a foreign language \* \* \* the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language," page 511. Baron Parke said: "In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it was written in a foreign tongue; but, it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which, at the time the instrument was written, had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes," page 555. Lord Chief Justice Tindal, speaking of ascertaining the meaning of a written instrument by external evidence, said: "Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur, in mercantile con-

tracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce," page 566-7. In the second volume of *Starkie on Evidence*, page 779, the learned author, in speaking of the admission of evidence to explain terms in a contract which are used in a special and peculiar sense, goes on to say: "The case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language which the Courts are not bound to understand." For these reasons we think that the original contract was properly admitted in evidence along with the translations.

The defendant tendered in evidence an instrument of writing purporting to be a contract between himself and his son Edward, in which his son described himself as the duly authorized agent of the plaintiff and Schelfhoudt, her brother. The Court refused to admit it. There was no evidence that Edward Badart was authorized to make a contract in behalf of the plaintiff, and consequently we approve of the Court's ruling. The third exception was taken to the Court's refusal to permit the defendant to testify that the plaintiff had an opportunity to object to the above mentioned contract. As the contract was not authorized by her, and was in no way binding on her, it was entirely irrelevant to inquire whether she had an opportunity to object to it or not. She had, however, testified under the commission that she never agreed to it. The fourth and fifth exceptions were taken to the refusal of the Court to admit an unsigned telegram, and a letter stated to have been received from Schelfhoudt, tending to show some change in the original contract between plaintiff and defendant. There was no evidence that Schelfhoudt had any authority to make any change in this contract. The sixth exception was to the Court's ruling in excluding from the jury a contract between Schelfhoudt and the defendant, dated May 26th, eighteen hundred and eighty-eight, and a letter from the same person, dated March 26th

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of the same year. These papers had been admitted subject to exception. The letter was preliminary to the contract between the plaintiff and defendant. In this letter the following words occur: "I have asked you for a contract similar to mine for Therese" (the plaintiff.) The contract referred to was the one just mentioned. As the plaintiff's contract with the defendant was executed subsequently to the letter and contract in question, to-wit, on the twentieth of April, eighteen hundred and eighty-nine, all the preliminary negotiations were merged in it. The established rule is stated in *Greenleaf's Evidence*, section 275: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." Defendant offered eight prayers, but subsequently withdrew the fifth and sixth. The Court rejected the first, second, fourth and eighth and granted the third and seventh. The first prayer maintained that there was no evidence legally sufficient to entitle the plaintiff to recover. It was competent for the jury to find the execution of the contract; the correctness of the translation offered in evidence by the plaintiff; the delivery of the ten thousand dollars to the defendant, and his failure to repay it at the expiration of two years. If they found these facts, the plaintiff's right of recovery was established. We have already disposed of the questions in the second and fourth prayers by what we have said on the second, third, fourth and fifth exceptions. The eighth prayer is in these words: "The jury are instructed that the contract of April 20th, 1889, offered in evidence

by the plaintiff, is not binding upon the defendant unless it was either delivered to the plaintiff personally or to an agent of the said plaintiff authorized to receive it, by the defendant personally or through an agent authorized to deliver it, and unless the jury shall find such delivery, then, under the pleadings and all the evidence in the cause, their verdict must be for the defendant ; but the jury are further instructed that possession and production of the said contract by the plaintiff is *prima facie* proof of its delivery." This prayer is drawn with great ingenuity. We will inquire whether it was proper to be given to the jury under the evidence in the cause. The defendant shewed by his own testimony that he had executed this contract ; that it was in the plaintiff's possession with his knowledge ; that he had received the plaintiff's money under it ; that he had written a letter to her (October 14th, eighteen hundred and ninety), in which he suggested a modification of it ; and that he had paid money under it to Schelfhoudt for her use. It would hardly be just, in the face of such testimony, to allow him to deny the delivery before the jury. If it were necessary to decide the question, we should be inclined to adopt in this case the rule applicable to holders of promissory notes ; that is to say, that possession is *prima facie* evidence of delivery, and that it is sufficient to enable the holder to maintain a suit unless *mala fides* is proved. *Whiteford v. Burckmyer*, 1 Gill, 145 ; *Burckmyer v. Whiteford*, 6 Gill, 16 ; *Merrick v. Bank of Metropolis*, 8 Gill, 71. We do not wish, however, to be understood as intimating that where two parties enter into a written contract, and one of them performs all the stipulations on his part, that the other can defeat an action on the contract by refusing to deliver the instrument. This eighth prayer ought not under any circumstances to have been granted, because, even if the instrument had not been delivered, and the non-delivery had nullified the contract, the defendant would have been liable on the common counts in the declaration for the plaintiff's money which had been delivered to him.

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In the instruction given by the Court, it was assumed that the translation asserted by the plaintiff was correct. We have seen that this question ought to have been left to the jury; but as there was no special exception to this instruction, we cannot reverse for this reason.

*Judgment Affirmed.*

(Decided March 26th, 1895.)

## THE LAKE ROLAND ELEVATED RAILWAY COMPANY *vs.* JOHN McKEWEN.

*Contributory Negligence—Withdrawing Question from the Jury—  
Right to use of Streets.*

When in an action to recover damages for an injury alleged to have been caused by the defendant's negligence, the defendant contends that the injury was caused by the plaintiff's contributory negligence, the question should not be withdrawn from the consideration of the jury unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted evidence.

Although the plaintiff in this case was guilty of contributory negligence in attempting to drive across the tracks of the defendant, an electric railway company, without slackening his speed and looking in both directions as soon as he was able to do so, in order to see if a car was approaching from either direction, yet, if the motorman of the car could have seen that the plaintiff was about to cross in front in a position of danger, and could by the exercise of reasonable care have avoided the injury, then the defendant is liable.

A street car has not a right of way on its tracks paramount to that of an ordinary vehicle. Neither has a right superior to that of the other, but each must exercise its right to use the street with due regard to the rights of the other.

Appeal from the Superior Court of Baltimore City. This was an action to recover damages for injuries to plaintiff's person and property alleged to have been caused by defendant's negligence. The evidence showed that the plaintiff,

driving west, in the day time, on Chase street, in Baltimore City, attempted to cross the tracks of the defendant, an electric railway company, on Guilford avenue, at the intersection of Chase street. The elevated portion of the railway begins about seventy-five feet south of Chase street, on Guilford avenue, and there is a down grade from that structure to Chase street. Plaintiff was driving a buggy, with the top lowered, at a slow trot, and upon arriving at Guilford avenue he turned his head south, to the left, to see if a car was coming down the elevated track, and then, hearing a rumbling noise, he looked quickly to his right and saw a car of the defendant coming rapidly towards him from the north. He endeavored to pull his horse out of the way, but the car struck the horse, cutting off one of his feet, and the plaintiff was thrown out of the vehicle and injured. Plaintiff did not lower his speed upon approaching the tracks, and did not look north, to his right, until after he heard the noise of the approaching car, when he was on the tracks. Had the plaintiff looked to the north on reaching the building line of Guilford avenue, he would have had an unobstructed view of the railway for two blocks, and could have seen the car.

The evidence on the part of the plaintiff was to the effect that no gong was sounded on the car as it approached Chase street, and that it was running at a much greater speed than that permitted by the city ordinances. But this was contradicted by the defendant's witnesses, who also testified that the plaintiff was driving rapidly and ran into the car.

The defendant offered the following prayers:

*Defendant's 1st Prayer.*—That there is no legally sufficient evidence in the case from which the jury can find that the injury complained of resulted from the negligence of the defendant or its servants, and the verdict of the jury must therefore be for the defendant. (Rejected.)

*Defendant's 2nd Prayer.*—That it appears from the uncontradicted evidence in the cause that the plaintiff, by his

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own negligence, directly contributed to the happening of the injury complained of, and the verdict of the jury must therefore be for the defendant. (Rejected.)

*Defendant's 3rd Prayer.*—The defendant prays the Court to instruct the jury that if they believe from the evidence that the plaintiff could have avoided the happening of the injury complained of by the exercise of ordinary care on his part, then their verdict must be for the defendant. (Rejected.)

*Defendant's 4th Prayer.*—The defendant prays the Court to instruct the jury that if they believe from the evidence that if the plaintiff could have avoided the happening of the injury complained of by the exercise of ordinary care on his part, then their verdict must be for the defendant, even though they should further find that the defendant's agent was guilty of negligence. (Rejected.)

*Defendant's 5th Prayer.*—The defendant prays the Court to instruct the jury that if they shall believe from the evidence that the accident was directly caused by the concurrent negligence of the plaintiff and the said defendant, and that it could have been avoided by due and proper care on the part of either said plaintiff or said defendant, then their verdict must be for the defendant, without regard to whose negligence was greater. (Rejected.)

*Defendant's 6th Prayer.*—The defendant prays the Court to instruct the jury that if they shall find from the evidence that the plaintiff was in the habit of crossing the tracks of the defendant at the corner of Guilford avenue and Chase street, and knew that the electric cars of the defendant were passing and repassing on said tracks at short intervals and at six miles an hour, then it was the duty of the plaintiff, at the time of the happening of the injury complained of, to look in both directions, up and down the street, to observe the movements of the cars of the defendant; and if the jury shall find that the plaintiff did not so look, and that the injury would not have happened if he had so looked, then their verdict must be for the defendant. (Rejected.)



*Defendant's 8th Prayer.*—The defendant prays the Court to instruct the jury that if they shall find from the evidence that the motorman of the defendant saw the plaintiff driving slowly along Chase street, approaching the track upon which the defendant's car was running, seated in an open buggy, then the motorman had the legal right to assume that the plaintiff saw the approach of the defendant's car, and that he would not attempt to cross the track in front of the defendant's car, but would stop and allow the defendant's car to pass. (Rejected.)

*Defendant's 9th Prayer.*—The defendant prays the Court to instruct the jury that it is the duty of a person crossing an electric street railway, on a city street, to look in both directions to observe whether a car is approaching before driving upon the track, and a failure to do so is negligence *per se*, and the facts, if the jury shall find them as facts, that the defendant's car was traveling at a rate of speed not authorized by law, or that the motorman was not ringing his gong, do not excuse the plaintiff from the duty of looking in both directions. (Rejected.)

*Defendant's 10th Prayer.*—The defendant prays the Court to instruct the jury that a street car has a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles. (Rejected.)

*Defendant's 11th Prayer.*—The defendant prays the Court to instruct the jury that the burden of proof is upon the plaintiff to show that the motorman of the defendant did not use reasonable care to avoid the consequences of the negligence of the plaintiff. (Granted.)

The Court below (RITCHIE, J.), granted the 11th prayer of the defendant and rejected all of its other prayers, and also granted the following prayer of the plaintiff:

*Plaintiff's 4th Prayer.*—That if the jury shall find a verdict for the plaintiff, in estimating the damages they are to consider the physical condition of the plaintiff before the injury complained of as compared with his present condition in consequence of said injury, and whether the said injury

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is in its nature permanent, and how far it is calculated to disable him from engaging in those employments and pursuits for which, in the absence of such injury, he would be qualified, and also the physical and mental suffering to which he was subjected by reason of the said injury, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which he has sustained, and also the value of the horse driven by said plaintiff at the time of the accident, and any damage to his buggy and harness due to the said accident.

The Court then instructed the jury as follows:

*Court's Instruction.*—"The Court instructs the jury that the plaintiff, being familiar with the crossing of defendant's electric road at the corner of Chase and North streets, and approaching the same on Chase street from the east, in a buggy with the top lowered, at the rate of about four miles an hour, was guilty of contributory negligence in attempting to cross the tracks of said road without lowering his rate of speed and without looking to the north, and without paying any attention whatever to the possibility of the approach of a car from that direction, or making any inquiry or effort to ascertain whether or not a car was approaching from said quarter, until his horse was upon the second or westerly track, it appearing that the plaintiff, had he looked to the north when he reached the east building line of North street, would have had an unobstructed view of the railroad for two blocks, and could have seen the car in question, and that he therefore is not entitled to recover, unless the jury believe from the evidence that the motorman of the car in question, after he saw, or by the exercise of due care might have seen that the plaintiff was approaching the tracks and was apparently about to cross in front of his car, and that the attempt to do so would be dangerous to the plaintiff, might still, by the exercise of reasonable care in the management of said car, have avoided the collision, but failed to exercise said care."

The jury rendered a verdict for the plaintiff for \$200, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Francis K. Carey* (with whom were *John N. Steele* and *John E. Semmes* on the brief), for the appellant.

The undisputed facts, which are fairly summarized in the Court's instruction, entitled the appellant to a verdict, whether it was guilty of negligence or not either before or after the appellee had negligently placed himself in a position of danger.

The appellant's car, which ran over the horse's foot, was stopped by the appellant's motorman in the middle of the bed of Chase street, so as to practically make it impossible for the appellee to cross Guilford avenue, and when the car came to a dead stop the horse and buggy were still on the east side of the car, and the buggy was standing opposite, about the middle of the car. The car did not run into the appellee, but the appellee ran into the car.

It is the undisputed testimony that the appellee was going about four miles an hour, which is hardly more than a rapid walk. The appellee describes his horse's gait as a "jog trot." He had, therefore, full control of his horse, and the motorman would naturally infer, until the appellee had actually allowed his horse to get upon the southbound track, that it was his intention to halt and permit the car to pass.

There is no evidence in the case tending to show that the appellant was guilty of negligence, either before or after the appellee recklessly placed himself in a position of danger. The following general rules are so well established in this Court that it is only necessary to state them :

(1.) The burden of proof is upon the plaintiff to show that the injury complained of was the direct consequence of the defendant's negligence, and there is no *prima facie* presumption of negligence from the fact than an accident happened. *Stebbing's case*, 62 Md. 515; *Dyrenfurth's case*, 73 Md. 374. (2.) A mere *scintilla* of evidence will not justify

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the Court in sending a case to a jury, nor is evidence which simply gives opportunity for conjectures or surmises sufficient for that purpose. *Savington's case*, 71 Md. 599. (3.) It is necessary for the plaintiff to offer evidence tending to prove that the accident resulted from the want of some precaution which the defendant might or ought to have resorted to, and to show with reasonable certainty what particular precaution should have been, and was not, taken to avoid the accident. *Stebbing's case (supra.)*

The testimony of the witnesses for the appellant affirmatively establish the lawful speed of the car, the ringing of the gong, the reversal of the current and the application of the brake as soon as it was apparent that the appellee was rushing upon danger, and the stoppage of the car in an incredibly short distance before the middle of the car had passed the buggy in which the appellee was sitting.

The gross negligence of the appellee being undisputed, the case should have been taken from the jury, because there was no evidence that the appellant failed in any respect to use ordinary care to avoid the consequences of the negligence of the appellee.

It surely will not be contended that an electric car, authorized (for the public purpose of securing rapid transit) to cross open streets at six miles an hour and to travel between streets at ten miles an hour, is required to slow up or stop whenever the motorman sees a foot passenger or a vehicle *approaching* a street crossing. That the motorman should exercise constant watchfulness in traveling at such speed through the streets of a city, is plain. But if the speed of the car is to be reduced or the car is to be brought to a stop simply because there is a *possibility* that a man should be so lost to the instincts of prudence as to walk or drive suddenly across the track in front of a car, it would be impossible for the company to serve the demands or convenience of the public. A motorman is no more required to assume that a man will rush into certain danger than he is to assume that he is drunk or crazy.

The conduct of the appellee, with full knowledge of the locality, in omitting to look in the direction of the approaching car (the tracks being in full sight for two squares), or to pay any attention to the possibility of its approach, or to make any inquiry or effort to ascertain whether it was approaching until too late to save himself, was so grossly negligent as to disentitle him to recover, whether the appellant was negligent or not in its conduct. The appellant claims that this proposition is sustained by the recent decision of this Court in the case of *State, use of Dyrenfurth v. B. & O. R. R. Co.*, 73 Md. 374, 377.

The proposition of law for which the appellant contends has been fully sustained, in its application to cable and electric street railways, by the Courts of New York, Pennsylvania and other States. *Whelahan v. Phila. Traction Co.*, 150 Pa. St. 187, 190; *Ehrismann v. Harrisburg Ry. Co.*, 150 Pa. St. 180, 187; *Carson v. Fed. St. & Pleasant Valley Ry. Co.*, 147 Pa. St. 219, 224; *Ward v. Rochester Electric Rwy. Co.*, 17 N. Y. Supp. 427; *Scott v. Third Ave. Ry. Co.*, 16 N. Y. Supp. 350, 351.

*George R. Gaither, Jr.* (with whom was *Harry M. Clabaugh* on the brief), for the appellee.

ROBERTS, J., delivered the opinion of the Court.

This action was brought in the Court below to recover damages from the defendant company for its alleged negligence. A satisfactory statement of the facts contained in the record will be found in the reporter's notes of testimony placed at the head of this case.

The record presents but one exception, which is taken by the defendant to the action of the Court in granting a special instruction of its own, and also the fourth prayer of the plaintiff, and in rejecting the first, second, third, fourth, fifth, sixth, eighth, ninth and tenth prayers of the defendant. The plaintiff's fourth prayer announces the rule of damages, which was not discussed at the hearing, and if controverted we fail to discover any objection to it. The

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instruction given by the Court is quite as favorable, if not more so than under the testimony in the record the defendant was entitled to have. This instruction does not leave the question of contributory negligence on the part of the plaintiff to be found by the jury, but declares as matter of law that in what he did he was guilty of contributory negligence, and concludes, "and therefore the plaintiff is not entitled to recover, unless the jury believe from the evidence that the motorman of the car in question, after he saw, or by the exercise of due care might have seen, that the plaintiff was approaching the track and was apparently about to cross in front of his car, and that the attempt to do so would be dangerous to the plaintiff, might still, by the exercise of reasonable care in the management of said car, have avoided the collision, but failed to exercise such care."

The objection of the defendant in this appeal is mainly to the Court's instruction and not so much to the refusal of the Court to grant its prayers. The Court's instruction upon the subject of the plaintiff's contributory negligence is, as already stated, quite as favorable to the defendant as it had any right to expect.

The Court was clearly right in rejecting the defendant's first and second prayers, for the reason that the Court should in no case take the question of negligence from the jury, unless the conduct of the plaintiff relied on as amounting *in law* to contributory negligence, is established by *clear and uncontradicted* evidence. *McMahon's case*, 39 Md. 449. The conflict of testimony in the record justified the Court's action in this respect and left no other course to be rightly followed.

After the Court's special instruction, the fourth, fifth, sixth, eighth and ninth prayers were unnecessary and well calculated to mislead the jury. The doctrine announced in the concluding portion of the Court's special instruction, to which exception is taken, has been so frequently and so thoroughly discussed and affirmed by this Court in all its

legal relations to the subject of negligence, that there remains nothing further to be said, except to repeat that we have repeatedly approved and applied the doctrine of the instruction in numerous cases, notably in *McMahon's case*, *supra*; *McDonnell's case*, 43 Md. 551; *Green's case*, 56 Md. 92; *Wallace's case*, 77 Md. 435; *Arnreich's case*, 78 Md. 589; *Coleman's case*, *ante*, p. 328, decided Dec. 19, 1894.

The tenth prayer asserts a proposition which has never been declared to be law in this State, and which, for very obvious reasons, we think is not entitled to the sanction of this Court. The Court below was asked to say "that a street car has a right of way on that portion of the street upon which alone it can travel, *paramount* to that of ordinary vehicles." The doctrine had at one time found expression in some of the Courts of this country, but a just sense of criticism has caused it to be abandoned. It would be both unjust and unwise to permit such a doctrine to prevail in our Courts. It makes no material difference how street cars are propelled, whether by animal power, electricity or otherwise. The vice of the doctrine contended for does not involve the subject of the motive power. It is solely a question as to the mutual rights of street car companies and of individual citizens to use the streets of a city. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the rights of the other. *Omaha St. Ry. Co. v. Cameron* (Neb.) 61 N. W. 606; *Lyman v. Union R. Co.* 114 Mass. 83; *Adolph v. Central, &c., R. Co.*, 65 N. Y. 554; *Connelly v. Trenton Pass. Ry. Co. Consolidated*, N. J. Err. App. 29 Atl. R. 438.

Since the preparation of this opinion the case of *Cooke v. The Baltimore Traction Company* has been decided by the Court, *ante*, p. 551. The opinion in that case contains a careful review of the questions presented on this appeal and dis-

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penses with the necessity for further consideration of the case. The judgment will be affirmed.

*Judgment affirmed with costs.*

(Decided March 26, 1895.)

## THE BALTIMORE TRACTION COMPANY *vs.* JOHN CONRAD APPEL.

*Special Findings of Fact—When Request for them to be Made—Contributory Negligence—Driving Across Tracks of Street Railway Company.*

When a party asks to have the jury instructed to render a special finding concerning a material fact, under the Act of 1894, chap. 185, the request should be made at the time the prayers are submitted. It is too late to present such request after the close of the argument, and when the jury are about to retire.

Plaintiff drove in a wagon slowly across the tracks of the defendant, a street electric railway company, and was struck by a car which he first saw approaching when about three hundred feet distant. In an action to recover damages, *Held*, that the jury were properly instructed that if the plaintiff was guilty of the want of ordinary care in attempting to cross the tracks of the defendant under the circumstances of the case, then he is not entitled to recover, unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track and was in danger of being struck by the car.

The evidence in this case being conflicting as to whether the motorman rang the gong before the collision, or made an effort to avoid the same after seeing that the plaintiff was in a position of peril, the plaintiff's conduct was not such contributory negligence in law as to justify the trial Court in withdrawing the case from the jury.

Appeal from the Superior Court of Baltimore City. The evidence showed that the plaintiff, driving east in a one-horse wagon, on an intersecting street, came to Charles street, where



are the double tracks of the defendant, an electric railway company. When his horse reached the first, or western track, plaintiff looked south and saw a car about 337 ft. distant coming north on the second or eastern track. Plaintiff kept on, and the car, continuing its course, struck the hind wheel of plaintiff's wagon, throwing him out and causing serious injury. When plaintiff's horse reached the second track, the car was distant about one hundred feet. The testimony on the part of the plaintiff was further to the effect that no bell was rung; that the motorman did not endeavor to stop the car, but that he could have done so, and that plaintiff was going at the rate of about three miles an hour. The defendant's evidence was that the motorman made every effort to stop the car when he saw that plaintiff was on the track and a collision imminent; that the gong was constantly rung and cries of warning uttered by the motorman, and that the plaintiff, just before the accident, was not looking in the direction of the car and had the reins hanging loosely down.

The plaintiff offered five prayers. The first, to the effect that if the accident was caused by the negligence of the defendant's motorman, then the plaintiff is entitled to recover; the second, that the burden of establishing the contributory negligence of the plaintiff is on the defendant; the third, that if the motorman could have seen that the plaintiff did not hear or comprehend the signals given, then it was his duty to stop the car; the fourth, that even if the plaintiff was guilty of contributory negligence, yet he is entitled to recover if the motorman could have avoided the injury by the use of ordinary care, after he saw, or might have seen, that the plaintiff was in danger.

The defendant offered twelve prayers. The first and third, to the effect that since the uncontradicted testimony showed that the accident was caused by the plaintiff's contributory negligence, the verdict must be for the defendant; the second, that there was no evidence of negligence on the part of the defendant; the fifth, that if the motorman did

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everything possible to stop the car when he saw that the plaintiff had put himself in a position of peril, the verdict must be for the defendant; the sixth, that the burden of proof to show negligence is on the plaintiff; the twelfth related to the imperfect condition of the car under the second count of the declaration; the eleventh, that if "the jury shall find that the plaintiff drove across the tracks of the defendant in front of a moving car which he saw was coming with the rapidity and at the distance testified to by him, and was struck by the car; and if they shall further find that the plaintiff did not watch the car, and that had the plaintiff watched the car he could have seen either that the motorman was not going to stop the car or could not stop the car in time to prevent a collision, and could have avoided a collision by whipping his horse or by the use of any diligence whatever, they are instructed that he was guilty of contributory negligence, and their verdict must be for the defendant; and there is no evidence to show that the plaintiff did whip his horse or use any diligence whatever." The other prayers were to the effect that the act of the plaintiff in driving his wagon slowly in front of a rapidly moving car, which he plainly saw approaching, was such contributory negligence as to bar recovery, unless defendant failed to exercise reasonable care under the circumstances or was guilty of wanton neglect.

The Court below (RITCHIE, J.), granted all the prayers offered by the plaintiff, except the third, which it rejected, and rejected all the prayers offered by the defendant, except the twelfth, which it granted, and in lieu of the defendant's rejected prayers the Court granted the following instruction of its own:

"If the jury find that the plaintiff was guilty of the want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances testified to, then he is not entitled to recover unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the

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use of ordinary care might have seen, that the plaintiff was on the track and was in danger of being struck by the car."

After the argument of counsel before the jury, the defendant prayed the Court to submit the following interrogatories to the jury, to be answered by them: I. Could the motorman of the defendant, after he discovered the peril of the plaintiff, have stopped his car in time to prevent the accident while the wagon of the plaintiff was crossing the track at the speed at which said wagon was going? II. Did the motorman use reasonable care to stop the car after he became aware of the plaintiff's peril? III. Could the motorman have stopped the car in time to avert the accident? IV. Could the plaintiff have averted the accident by the use of ordinary care?

And the Court refused to submit said interrogatories, and passed the following order thereon, viz.:

"The Court declines to submit the above interrogatories: 1st. Because they are substantially covered by the instruction given; 2nd. Because not having been submitted until the arguments to the jury have been concluded and the jury is about to retire, they are too late. Albert Ritchie."

The defendant excepted to the refusal of the Court to submit said interrogatories to the jury, as well as to its action in granting the above-mentioned instructions and refusing the defendant's prayers. The jury returned a verdict for the plaintiff, for \$700, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

*Edward Duffy*, for the appellant.

The plaintiff says the reason he crossed was because he had plenty of time, and that he could have made his horse go faster. If he had been three or four feet farther on, he would not have been struck. Now, if the plaintiff admits that he had plenty of time to get across, and that he could

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have gotten across, had he hurried, surely it cannot be that the motorman was negligent in not stopping. If the plaintiff had plenty of time to get out of the way, the motorman had the right to assume that he would make use of his time.

But concede, for the sake of the argument, that the motorman was negligent in not stopping. This, if true, cannot help the plaintiff's case. Then the facts may be stated thus: The plaintiff, seeing a car coming towards him at a rapid rate of speed, attempts to cross in front of it; he has time to cross, and can hurry, but does not; he sees the car, or can see it if he chose to look, up to the time of the collision; he therefore sees, or can see, that the motorman is making no effort to stop, and he can see that no effort is being made, when the car is ten, fifteen, or twenty feet away from him, at which time he has but a few feet to go, to avoid a collision. A collision takes place. Does such collision happen by reason of the defendant's negligence, any more than by reason of the plaintiff's? Can it be said for one moment that this was not a glaring act of negligence, and that the accident happened by reason of such negligence? *Dyrenfurth's case*, 73 Md. 374; *Carson v. Rwy.*, 147 Pa. St. 219; *Ehrsman v. Rwy.*, 150 Pa. St. 180; *Thomas v. Rwy.*, 132 Pa. St. 504; *Mercier v. Rwy.*, 23 La. An. 264; *Davidson v. Rwy.*, 35 Pac. Rep. 920; *Ward v. Rwy.*, 17 N. Y. Supp. 427; *Scott v. Rwy.*, 16 N. Y. Supp. 350.

The jury should have been told that to go in front of a car when it is a square off and to go so slow that you are still on the track when the car reaches you, is not only being guilty of the want of ordinary care, but is contributory negligence. It is therefore submitted that the Court did not instruct the jury as fully as the defendant was entitled to have them instructed with regard to the particular facts. *Steever's case*, 72 Md. 150, 159; *Ringgold's case*, 78 Md. 409; *Mali's case*, 66 Md. 53.

If the plaintiff was not guilty of contributory negligence,

then the 5th prayer set forth the law of the case properly. Then, again, the Court refused the defendant 6th prayer's on the burden of proof. This prayer was a correct statement of the law, and the defendant was entitled to have the jury told where the burden of proof in the first instance lay, as well as the plaintiff was entitled to have them told where the burden of proof of contributory negligence lay, which was done by the plaintiff's 2d prayer. *R. R. v. Stebbing*, 62 Md. 504, 515; *Whiteford v. Burckmyer*, 1 G. 144.

The fact that the interrogatories are practically covered by the instructions can be no reason for their refusal. The statute fixes no time when they shall be submitted. Why, then, is it too late to submit them after argument?

*C. D. McFarland* (with whom were *Emil Budnitz* and *Peter J. Campbell* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appellee brought suit against the appellant, a street railway company operating its lines in the city of Baltimore, for injuries sustained by reason of the negligence of one of its employees while propelling an electric car on the public streets of that city. The case was tried before a jury and, the judgment being for the plaintiff, the company has appealed. The questions arise solely upon exceptions to the rulings of the Court upon the prayers and a construction of the Act of 1894, chapter 185, relating to "Special Findings of Facts by Court or Jury."

Upon the close of the plaintiff's testimony, the Court was asked to withdraw the case from the jury; first, because of the contributing negligence of the plaintiff; and secondly, because there was no legally sufficient evidence to entitle the plaintiff to recover. And the failure of the Court to so instruct the jury forms the basis of the first bill of exception. In refusing to grant these prayers or either of them, the Court committed no error, because there was evidence, if the jury believed it, to entitle the plaintiff to recover.

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The Court having refused at this point of the case to take the case from the jury, the appellant offered its evidence, and the second exception embraces the rulings of the Court at the close of the testimony upon the prayers of both plaintiff and defendant. There were seventeen prayers in all. The first, second, fourth and fifth prayers of the plaintiff were granted and the third rejected. All of the defendant's prayers were rejected except its twelfth, and the Court granted in lieu of the rejected prayers an instruction of its own, which we will hereafter consider.

The first, second and fourth prayers of the plaintiff were properly granted, and have been approved in recent street railway cases decided by this Court. *Baltimore Traction Co. v. Wallace*, 77 Md. 435; *Central Railway Co. v. Coleman*, ante, p. 328; *Arnreich's case*, 78 Md. 589; *Cooke v. Traction Co.*, ante, p. 551.

The fifth prayer related to the measure of damages in the event of a verdict for the plaintiff, and was not seriously controverted by the defendant.

By the first, second and third prayers of the defendant, which had been previously rejected, the question as to what constitutes contributory negligence, was sought again to be made one of law for the Court rather than one of fact for the jury to determine, upon the facts of the case. This Court has repeatedly decided that the question of negligence or the want of ordinary care where there was a contrariety of evidence in cases like the one here presented, is one of fact for the jury. This is the approved doctrine both in England and this country, and we deem it unnecessary to refer again to the adjudicated cases bearing upon it. As already stated, these prayers, under the facts of this case, were properly rejected.

The prayer granted by the Court in lieu of the other rejected prayers of the defendant fully and fairly covered the law of the case. It told the jury that if the plaintiff was guilty of the want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the

circumstances of this case, then he is not entitled to recover, unless the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, and was in danger of being struck by the car.

The third bill of exception involves an important question of practice under the Act of 1894, chapter 185, allowing in this State special findings of fact, in all cases where issues of fact are submitted to Court or jury. This Act provides that: "In all cases where issues of fact are submitted to a jury the Court may, at its own discretion, or shall, at the request of either party, require the jury, in addition to rendering a general verdict for the plaintiff or defendant, to find specially upon any particular questions of facts material to the issues on trial, which questions shall be in writing; and in all cases at law where issues of facts are tried before a Court without a jury, the said Court, at the written request of either party, find specially upon any question of fact which it may deem necessary to be determined in order to arrive at its verdict. All such special finding of facts, whether by the jury or by the Court, shall be in writing, and must be filed with the Clerk as part of the record of the case, and in civil cases, where a special finding of facts shall be inconsistent with the general verdict rendered at the same trial, the former shall control the latter and the Court must give judgment accordingly; but nothing herein contained shall limit the Court's power to grant a new trial or to arrest judgment on motion."

In the case before us, the Court refused to submit the special questions, because they were too late, not having been requested until after the arguments had been concluded and the jury were about to retire. It will be observed that while the statute imperatively requires the Court, at the request of either party, to instruct the jury, in addition to rendering a general verdict, to find specially upon particular questions of fact, material to the issue, yet it nowhere prescribes the time when the request shall be

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made or when they shall be presented to the Court. It is clear, then, that the law leaves it to the sound discretion of the trial Court. The Supreme Court of Indiana so held in the case of *Kopelke v. Kopelke*, 112 Ind. 435, and reaffirmed in *Hartlep et al. v. Cole*, 120 Ind. 253, in construing a similar statute. And to the same effect is *Thompson on Trials*, page 2021.

The better practice, we think, independent of any rule of Court, would be to make the request at the time of the submission of the prayers; certainly not later. Manifestly it is too late, after the close of the argument and the jury about to retire. The action of the Court in rejecting the request in this case was not error.

Finding no reversible error in any of the rulings of the Court upon either the prayers or special findings of fact, and as the case was properly submitted, we shall affirm the judgment.

*Judgment affirmed with costs.*

(Decided March 26th, 1895.)

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HOFFMAN, EAVEY & CO. vs. CATHERINE A.  
SHUPP, BY HER NEXT FRIEND, ETC.

*Void Judgment against Married Woman—Scire Facias—Injunction.*

A married woman executed a promissory note without the joinder of her husband, and signed an order for a confession of judgment on the note, also without the joinder of her husband, upon which order judgment was entered. This judgment was subsequently revived by *scire facias*. Held, that the judgment was void and its execution should be restrained by injunction.

The revival of a judgment by *scire facias* effects no change in its nature or character.

A judgment against a married woman alone is void, unless the cause of action is within the statutes allowing actions at law against married women.



Appeal from a decree of the Circuit Court for Washington County (STAKE, J.), perpetually enjoining the execution of a judgment against the appellee, a married woman. The execution was levied on the statutory real estate of the married woman, which had not been purchased with money earned by her own skill and industry. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*J. Clarence Lane*, for the appellants.

The judgment is not a void but a valid one. The common law rule, that all judgments or contracts against married women are void, is not applicable to the changed status of married women. Such judgments are no longer void. *Freeman on Judgments*, sec. 150, p. 271, and cases cited; *Ahern v. Fink*, 64 Md. 161.

"The tendency of modern authority is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability." 2 *Pomeroy Equity Jurisprudence*, sec. 814; *Frazier v. Gelston*, 35 Md. 298; *Dobbin v. Cordiner*, 41 Minn. 165; (4 L. R. A. 333); *Speier v. Opfer*, 73 Mich. 35; (2 L. R. A. 345.)

So it has been held in other States that where coverture has not been pleaded in time, the judgment is good, although rendered on a contract for which the married woman was not legally liable. *Jones v. Crosthwaite*, 17 Iowa, 393; *Wolf v. Van Metre*, 19 Iowa, 134; (33 Ib. 397); *McDaniel v. Carver*, 40 Ind. 250; *Wagner v. Ewing*, 44 Ind. 441; *McCurdy v. Baughman* (Ohio), 1 West. 33; *Freiser v. Bates College*, 128 Mass. 464.

*F. F. McComas*, for the appellee.

There can be no doubt that the original judgment by confession is absolutely void, because prior to the Act of 1872, chap. 270, no action of law would lie against a married

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woman upon any agreement or contract made by her, and a judgment against her *in personam* was a nullity. *Griffith v. Clarke*, 18 Md. 457. The Act of 1872, chap. 270, restricts the liability of a married woman to be sued to contracts signed jointly with her husband, and it is only in such cases that her common law incapacity is removed. *Lowenkamp, Exr. v. Koechling*, 64 Md. 95.

The case of *Ahern v. Fink*, 64 Md. 161, differs from this case, inasmuch as the married woman in that case was a widow and freed from all disabilities before the return day. The proof in this case shows that the property levied on belonged to a married woman, and was not acquired by her own industry, *but by inheritance*. There is no allegation in the proceedings upon which the judgment is rendered to make out a case against one of the exceptions as to a suit against a married woman referred to by the Court. It is a judgment confessed by a married woman, which, whilst in the judgment proceedings it does not appear she was married, is proved in these equity proceedings, and admitted in the answer. This Court has said a judgment recovered against a married woman, with nothing to show she was in the capacity of a trader, or doing business under any of the exceptions provided by the Act of Assembly, is a void judgment and cannot be enforced against her. *Sec. 7, Art. 45 of the Code*; *Lowenkamp v. Koechling*, 64 Md. 96; *Griffith v. Clark*, 18 Md. 457; *Crone v. Linevill*, 31 Md. 147; *Kerchner v. Kempston*, 47 Md. 589; *Morse v. Toppon*, 3 Gray (Mass.) 411; 2 *Bishop on Married Women*, 530.

A void judgment may be assailed at all times, and in all proceedings by which it is sought to be enforced. *Hanley & Welch v. Donoghue*, 59 Md. 244. The mere revival of a judgment of *fiat* will not give it any greater or higher qualities than it originally possessed. If original judgment is conditional the new one will be also. *Poe's Pleading*, sec. 609, &c., cases cited. It is upon the judgment recited in the writ that execution is awarded. *Poe's Pleading*, sec. 598. When revived it can be of no greater validity than

when obtained ; if not effective at first it can not be rendered effective by mere revival on original terms. *Huston v. Ditto*, 20 Md. 328.

BRYAN, J., delivered the opinion of the Court.

Catherine A. Shupp, a married woman suing by her next friend, filed a bill in equity against Hoffman, Eavey and others, for an injunction to restrain the execution of a judgment which they had obtained against her. After answer by the defendants, the Court below passed a decree for a perpetual injunction and the defendants appealed to this Court.

The evidence shows that on the 25th day of June, 1877, Mrs. Shupp executed her promissory note for the sum of two hundred and fifty dollars to the defendants, and signed an order for a judgment by confession, and that two days later the judgment was entered. She was then and is now a married woman, and her husband did not join in the execution of the note, and did not sign the order for a confession of the judgment. In September, 1888, a *scire facias* was issued on this judgment, and it was revived in due course by the *fiat executio*. On appeal to this Court the decision below was sustained. The principal question in this Court was whether the defendant in the judgment could plead her coverture, in answer to the *scire facias*, and we held that it could not be allowed. We simply adhered to the well-established rule that no defence could be pleaded to the *scire facias* which might have been set up in bar of the original action ; 72 Md. 360. The revival of the judgment worked no change in its nature, character and effect as it originally existed. It was said in *Moore v. Garrettson*, 6 Md. 448 : "The office of a *scire facias* to revive a judgment is to reinvest it with all the powers, attributes and conditions which originally belonged to it, and which have been wholly or in part suspended by lapse of time, change of parties, or the like." We consider this principle as absolutely settled, and deem it unnecessary

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to cite any of the numerous cases which declare the same doctrine.

The question, then, is whether the original judgment was valid. By the Act of 1872, chapter 270, a married woman may be sued jointly with her husband on any note, bill of exchange, single bill, bond, contract or agreement which she may have executed jointly with her husband. But very manifestly this Act can have no application to the present transaction, where the proceeding is against her alone on a note signed by her alone. It has not been contended that the judgment can be maintained under either of the Acts of Assembly, which, with some modifications, are now consolidated in Article 45, section 7, of the Code. These acts relate to proceedings against married women who have been doing business as *femes sole*. The first of them, in the form in which it existed at the time of the rendition of this judgment, did not permit proceedings against a married woman personally, but required that the proceedings should be by attachment against the property which she had acquired by her skill, industry or personal labor. The other Act, comprised in Article 45 (that of 1882, chapter 265), was not passed until long after this judgment had been entered. It does not admit of a question in this Court that judgments against married women are void unless they are upheld by the Acts of Assembly which we have mentioned. It is also well settled that the execution of them will be enjoined by decree in equity. *Griffith v. Clark*, 18 Md., 457; *Loweckamp v. Koechling*, 64 Md. 96.

*Decree affirmed.*

(Decided March 26th. 1895.)

JOHN R. HELDEN vs. WILLIAM F. HELLEN, TRUSTEE, ETC.

*Bill to Remove Cloud from Title—Rights of Purchaser at Execution Sale.*

A bill in equity to remove a cloud from a title cannot, as a general rule, be maintained, unless the plaintiff has both title and possession. If the possession of the land is in another, his remedy is by an action of ejectment.

M. executed a deed of trust of land to the defendant to secure the payment of certain promissory notes given by the grantor to a third party. Subsequently a judgment against M. was obtained by A., upon which an execution was issued, and the interest of M. in said land was sold to A., who received a deed from the Sheriff conveying said interest. A. then conveyed the land to the plaintiff, who filed a bill alleging that the original grantor, M., was never indebted to the payee of the notes; that the deed of trust to the defendant was made in fraud of the rights of the creditors of M., and praying that the same be vacated as a cloud on plaintiff's title, and that the notes mentioned in said deed be brought into Court and cancelled. The bill did not allege that the plaintiff was in possession of the land or that he was a creditor of M. at the time of the execution of the deed of trust. Upon a demurrer to the bill, *Held*, that the plaintiff was not entitled to have the deed of trust vacated as a cloud on his title, in this proceeding, but should be left to his remedy at law.

Appeal from an order of the Circuit Court for Prince George's County (BROOKE, J.), sustaining a demurrer to the bill of complaint filed in this cause, and dismissing the same. It appeared from the bill and exhibits that, on March 21, 1890, Thos. A. Mitchell and wife conveyed to W. F. Hellen, of the District of Columbia, certain real estate in Prince George's County, known as "Thos. A. Mitchell's sub-division of Ardwick," in trust to secure the payment of six promissory notes, aggregating \$7,000, made by Mitchell, payable to the order of W. W. Hall, the last of said notes falling due thirty-six months after date. The deed provided that until default be made in the payment of

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the notes, the grantor should remain in possession of the property. On June 27, 1892, R. W. Beall, former sheriff of said county, executed a deed to Charles A. Wells, reciting that in pursuance of judgments of condemnation in attachment suits by Wells against Thos. A. Mitchell, in January and April, 1891, amounting to \$422.75, levies had been made on the interest of Mitchell in said land, and the same had been sold to Wells for the sum of \$85, and the deed then conveyed to Wells all the estate, title, etc., of Mitchell in said parcel of land. On January 4, 1894, Wells, in consideration of five dollars, conveyed said land to the plaintiff, Helden. The bill alleged that, at the time of the execution of the deed of trust from Mitchell to Hellen, the former was indebted to Wells in the sum of \$422.75; that Mitchell never was indebted to Hall in the sum of \$7,000, or in any other sum; that the deed was without consideration and in prejudice of the rights of subsisting creditors of Mitchell (now deceased.) The bill prayed that the deed of trust might be annulled, and the notes mentioned therein be decreed to be brought into Court and cancelled, and that the cloud cast by said deed on plaintiff's title might be removed. The defendants were W. F. Hellen and W. W. Hall, both non-residents, and an order of publication was asked for against them.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

*Marion Duckett* (with whom was *E. Dent* on the brief), for the appellant.

There is no question but that the demurrer admits all of the substantial facts set forth in the bill, viz: that the plaintiff held a deed for this land from Charles A. Wells, who had recovered judgment in two attachment suits against Mitchell, issued execution thereon, bought the property, obtained the sheriff's deed for it. That Mitchell, the attachment debtor, had executed a fraudulent and void trust to the de-

fendant Hellen on this property to secure Wm. W. Hall large sums of money, to whom he had given notes for the same, but to whom he owed nothing, and therefore, that said trust must have been what is commonly called a "blanket mortgage," the purport solely being to hinder, delay and defraud the creditors of the grantor, and which operated as well as a cloud upon the title of those honest creditors of Thomas A. Mitchell, who had loaned him money, obtained judgments as evidence thereof, and further executed and bought said property in pursuance thereof.

It seems the only point raised by the demurrer can be, assuming the plaintiff's title as represented, had he such an estate in the land as would enable him to have said trust, and notes cancelled and declared a cloud upon his title. It seems to us the jurisdiction in equity to remove clouds upon title to real estate is so often applied, and so universally established, that the proposition becomes a self-answering one.

There is no question of the rights of any assignee of these notes set forth in the bill nor involved in the controversy, nor developed by the demurrer, the bill simply alleging that these notes were given to Hall and that Hall held them. If they had been assigned before maturity, for value received, without notice and *bona fide*, the defendant or the note holder should have protected himself by a plea alleging such facts.

A judgment creditor may show the character of his debtor's conveyance. Having purchased his debtor's land at a sale under execution issued upon his judgment, he may show that an absolute conveyance of the land made by his debtor was in fact a mortgage. He is entitled to a conveyance of it upon paying any balance due upon the mortgage; and without a purchase upon execution a creditor of the grantor may show that such absolute deed is really a mortgage and may enforce a judgment against the property or the proceeds of it, to the extent of the surplus, after

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satisfying the debt for the security of which it was given or conveyed. *Jones on Mort.*, vol. 1, sec. 337 (1894); *Judge v. Reese*, 24 N. J. Eq. 387; *Clark v. Condit*, 18 N. J. Eq. 358; *Brown v. Witts*, 57 Cal. 304; 15 *Ency. of Law*, p. 754, note; *Macaulay v. Smith*, 132 N. Y. 524.

*Charles H. Stanley*, and *R. Ford Combs*, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appeal in this case is from an order sustaining a demurrer to a bill in equity. The bill charges that the appellant obtained by deed from Dr. Charles A. Wells and Mrs. Wells, on the 4th of January, 1894, a tract of land situate in Prince George's County, containing 129 acres; that Dr. Wells previously purchased the land at sheriff's sale, at the suit of himself against one Thomas A. Mitchell, and on the 27th of June, 1892, obtained the sheriff's deed; that Mitchell, on the 21st of March, 1890, being on that date indebted unto the appellant's grantor, executed an instrument of writing purporting to be a deed of trust, and professing to convey unto Wm F. Hellen, one of the appellees, this tract of land, together with other lands, to secure to one William W. Hall an indebtedness of seven thousand dollars, covered by six promissory notes from Mitchell to Hall.

It further charges that Mitchell was never indebted to Hall in the sum set forth in the pretended deed of trust, or in any other sum; that the deed of trust is without consideration, was made in prejudice of subsisting creditors, is fraudulent, void, and operates as a cloud upon the appellant's title. The bill then prays that the deed of trust be annulled and set aside; that the notes secured by the deed decreed to be brought in and cancelled; that the cloud upon his title to the land be removed, and concludes with a prayer for general relief. And to this bill a demurrer was interposed, which was sustained by the Court, and the bill dismissed.



The question, then, presented for our consideration, is whether the plaintiff has presented such a case by the bill as entitles him to the relief he seeks. It is manifest that the appellant is not entitled to invoke the jurisdiction of a Court of Equity for "the quieting of title and the removal of a cloud therefrom," because his bill fails to allege that the plaintiff was in the possession of the property at the time the bill was filed; it being well settled in this State, as a general rule, that the jurisdiction of a Court of Equity cannot be maintained to remove a cloud from title unless the party has the legal title and the possession. If the possession is in another, his remedy is by an action of ejectment. *Crook v. Brown*, 11 Md. 158; *McCoy v. Johnson*, 70 Md. 490; *Livingston v. Hall*, 73 Md. 386. And the case of *Stewart v. Meyer et al.*, 54 Md. 454, relied upon by the appellant, is not in conflict with this rule as applicable to a case like the one here presented. *Textor v. Shipley*, 77 Md. 479.

Nor can there be any question that a creditor who has pursued his remedy at law by an ineffectual execution on his judgment, can invoke the aid of a Court of Equity to have fraudulent conveyances standing in his way and covering up the property, set aside and vacated. This relief is fully established by authority. *Trego et al. v. Skinner et al.*, 42 Md. 430. But the plaintiff here is in no sense a creditor of Mitchell, the alleged fraudulent grantor. The relation of debtor and creditor between Dr. Wells, the plaintiff's grantor, and Mitchell, the grantor under the deed of trust, ceased to exist, by the execution sale, so far as the property sold and sought to be recovered in this proceeding can be affected. The plaintiff acquired the title of the purchaser at the sheriff's sale, and can assert no better equity than those under whom he claims. *Baxter and Wife v. Sewell*, 3 Md. 338. And whether the conveyance to the appellee Helden was fraudulent or not can be tried in an action of ejectment. *Welde & Logan v. Scotten*, 59 Md. 73; *Hecht v. Colquhoun*, 57 Md. 563; *National Park Bank v. Lanahan, Trustee*, 60 Md. 510.

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In the case of *Polk v. Pendleton*, 31 Md. 118, it was distinctly held that a party not in possession of the land, but claiming title to it under an execution sale could not maintain a bill to have the adverse title of the party in possession claiming under a tax sale declared void or to have the question of title adjudicated. And in the case of *Thigpen v. Pitt et al.*, 1 Jones Equity, N. C. Reports, 49, the Supreme Court of North Carolina, in treating of a case somewhat similar to the one here presented, held, that where a debtor makes a conveyance of land with intent to defeat his creditors, and they proceed to have the land sold, treating the conveyance as void, one who becomes a purchaser and takes a sheriff's deed has no right to call on a Court of Equity to have the fraudulent deed brought in and cancelled upon the ground of removing a cloud from his title. "This," says that Court, "would be a novel attempt to extend the jurisdiction of Equity, and have it try and dispose of a pure legal question." And in the case of *Welde and Logan v. Scotten*, 59 Md. 76, this Court held, that an injunction would not be granted to prevent a judgment creditor from selling and purchasing the property under an execution, so as to put himself into a position to test at law, through ejectment, the validity of another's title alleged to be fraudulent. The question was left to be litigated at law. "The real question," said the Court in that case, "for us to decide is, should he (the judgment creditor), be prevented, by injunction, from putting himself into such position that he may have the question of the *bona fides* of the appellees purchase tested in a Court of law, through an action of ejectment. We are all of opinion that he ought not and that it was error in the Circuit Court to hold otherwise."

Whatever, then, may be the decisions elsewhere, no case in this State has gone so far as to maintain a bill in equity under the facts and circumstances of this case.

We shall, therefore, affirm the order appealed from, sustaining the demurrer and dismissing the bill with costs.

*Order affirmed with costs.*

(Decided March 26th, 1895.)

## APPENDIX.

\*COVINGTON D. BARNITZ, ADMINISTRATOR, ETC., *vs.*  
PATRICK REDDINGTON.

*Apportionment of Ground Rent—Presumption of Apportionment—  
Curative Act—Administration on Leasehold Estate.*

In 1793, the owner of a tract of land, including the lot in question, leased the whole tract for 99 years, renewable forever, to Q., subject to the yearly rent of two pounds and fourteen shillings. In the same year Q. subleased the lot in question to P., whose title by *mesne* conveyances became vested in appellants. In the sublease from Q. to P. the rent reserved was one pound four shillings *per annum*, and none of the subsequent conveyances mentioned any other rent as issuing out of the lot. There was evidence to show that for more than fifty years no other rent had been demanded from the owners of this lot. *Held*, that it was reasonable to conclude that the lot was not liable for any other rent, and that there had been an apportionment of the rent resting upon the original tract of which the lot in question was about one fifth.

In 1856, M. then being the owner of the above-mentioned leasehold lot, conveyed the same to B. by a deed in fee, which was not recorded for more than six months after its date. In 1875 the children of B., then deceased, procured a deed of the lot to themselves from M., in which it was described as leasehold. *Held*, that the deed to B. became operative by virtue of the Curative Act of 1860 (Code, Art. 2, sec. 19); that the deed from M. to B.'s children could not convey anything, since M. had divested himself of all title by the former deed; that since, at the time of the conveyance to B. by M., the latter had only a leasehold interest, B. acquired that only; and that in order to vest title in B.'s children, administration on B.'s estate was necessary.

Appeal from an order of the Orphans' Court of Baltimore. The case is stated in the opinion of the Court.

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\*This case, decided at the April Term, 1892, and then designated "not to be reported," is now published by order of the Court.

Md.]

Opinion of the Court.

The cause was argued before ROBINSON, MILLER, BRYAN, McSHERRY, FOWLER, IRVING and BRISCOE, JJ.

*C. D. Barnitz*, for the appellant. *Richard Bernard*, for the appellee.

IRVING, J., delivered the opinion of the Court.

The appellant, as administrator of Noah Butler and George Butler, by virtue of an order of the Orphans' Court of Baltimore city, offered for sale the interests of his two intestates in certain property described as leasehold property, subject to the payment of one cent ground rent if demanded. The interest of each of his decedents was described as one-third interest each, as tenants in common in a certain lot of ground on Harford avenue and Hoffman street, Baltimore, which is described by course and distance. The sale was reported to the Court as having been made to one Patrick Reddington for \$633.33  $\frac{1}{3}$  for each interest. The purchaser excepted in writing to the ratification of the sale, assigning several reasons for his objections; but upon only one has he relied in this Court, the others being abandoned. The reason pressed is, that the "property was sold subject to the yearly rent of one cent, whereas said property is subject to other and greater current rents." This exception was sustained by the Orphans' Court, and the sale was set aside. From that decision this appeal was taken.

Much of the record evidence which was before the Orphans' Court, and upon which their decision was based, is not to be found in the record sent to us; and but for the admission and concessions of fact found in the briefs of counsel, we would be wholly unable to review the action of the Court, and would be compelled simply to affirm, for want of sufficient information to satisfy us that there was error. From what is to be found in the record supplemented by the admissions of counsel, we think it reasonably clear that the sale ought to have been disapproved and set aside, as was done by the Orphans' Court. It is admitted that Ed-

ward Hanson, being the owner of the fee, leased the property, of which the lot sold by the appellant is a part, to one Simon Quinn, in 1793, for 99 years, renewable forever, reserving a yearly rent of two pounds and fourteen shillings. In the same year Quinn sublet to William Price the lot now in question. On both sides it is conceded, that by *mesne* conveyances, the title of Wm. Price finally became vested in the appellant's intestates, and their sister, Elenora Aikens, whose interest the appellant, as her attorney, sold at the same time that he sold the interests of his intestates, in order that the purchaser might acquire the title to the whole property, which it was claimed was held as undivided property, in equal shares, by Noah and George Butler and Elenora Aikens.

When the conveyance was made by Quinn to Price there was a reservation of one pound and four shillings annual rent, and no more. It is admitted that none of the conveyances of this lot mentioned any rent resting upon it, or issuing out of it, except the one pound four shillings which was reserved in the conveyance from Quinn to Price in 1793. As there is not only no evidence of any other rent except this one pound four shillings reserved in Quinn's deed to Price, but there is some proof that for more than 50 years no other rent has been exacted, it is reasonable to conclude, as the Chancellor did in *Speed v. Smith*, 4th Md. Ch. 231 (Brantly's edition), that this lot was not liable for any other rent; and that there had been an apportionment of the rent resting upon the original lot, and that this lot, which was only about one-fifth of the original lot, was allotted to pay a large share of the original rent; that which was put upon it being nearly one-half of the whole original rent.

To this extent, therefore, we disagree with the Orphans' Court; although that will make no difference in the result. We do not think, under the facts, that this lot was subject to any greater rent than that it was sold subject to. For another reason we think the Orphans' Court was right in their determination of the case.

Md.]

Opinion of the Court.

Both sides admit that in 1804 Lynch conveyed this lot to McAlister. As Lynch had only a leasehold interest to sell, we may suppose and presume he did not attempt to convey a larger estate than he actually owned. That conveyance is not in the record, but the admission of parties through their counsel, upon which thus far we have proceeded, does not give Lynch, or claim for him, a larger estate than a leasehold. That estate he conveyed to McAlister; and in 1856 McAlister conveyed it to Ann Butler, mother of the appellant's intestates, and Mrs. Aikins. This deed of McAlister to Ann Butler is in the record, and on its face it is a conveyance in fee. That deed was not recorded within six months, which the Act of 1856, chap. 154, required to be done to give it validity. It was nearly seven months before it was recorded, and under the provisions of the Act of 1856 that deed could not operate, even between the parties, as a *title paper*. But by the Act of 1860, chap. 133, which became section 19 of Article 21 of the Code of 1860, and is now section 19 of Article 21 of the Code of 1888, the non-record of the deed within the six months was cured, subject to the rights of certain creditors and purchasers without notice, which qualification, for obvious reasons, does not affect this case; *Brydon v. Campbell*, 40 Md., 331. Had appellant's intestates and Mrs. Aikens stood on that deed of McAlister to their mother and continued to claim a fee under it, having color of title to back them up, they might, after the lapse of twenty years, have acquired an unimpeachable title by adverse possession; but they did not do so. Distrusting their title, and perhaps supposing it void (though we are not informed why), they repudiated that title before it had ripened into a title by adverse possession, and procured a deed to them and Mrs. Aikens from McAlister, their mother's grantor, in 1875, for the same property, in which it was described as leasehold property. Inasmuch as McAlister had conveyed to Ann Butler *all* the title he had, of whatever sort that was, she took discharged of the rent of one pound four shillings.

Having by his deed to Ann Butler divested himself of *all his* interest in the property, McAlister's deed to appellant's intestates and Elenora Aikens was inoperative to give anything to them. His deed to Ann Butler, which, when first recorded, did not operate as a title paper, because it was not recorded within six months, became operative by virtue of the Curing Act of 1860, ch. 133.

The appellant's intestates, and Elenora Aikens, therefore, were entitled to claim such title only as their mother did really get from McAlister by her deed of 1856.

We know of no other title which McAlister had except that which he acquired from Lynch, which was only a leasehold estate ; therefore Ann Butler, by her deed from McAlister, took no other or greater estate than the grantor had, and that being leasehold, her children could only claim by distribution of her estate made by an executor or administrator. As no administration on her estate has taken place, it would seem that appellant's administration sale of that property was premature. The sale was properly set aside and the purchaser properly released.

The order appealed from will therefore be affirmed.

*Order affirmed.*

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## APPEAL.

1. Under Code, Art. 5, secs. 81, 82, upon an appeal from the determination of the County Commissioners concerning the opening of a new road, to the Circuit Court, the action of the Circuit Court is final and no appeal or writ of error lies to the Court of Appeals, when the orders passed, notices given, etc., meet the requirements of the law so far as jurisdictional questions are concerned. *Smith et al. v. Goldsborough et al.*, 49.
2. The form of the verdict and the judgment of the Circuit Court in such case cannot be reviewed by the Court of Appeals. *Ibid.*
3. Where the bill of exceptions fails to set forth the purport of the answer made by a witness to the question excepted to, the judgment will not be reversed, although it may have been error in the Court below to allow such question to be asked, because the Court of Appeals cannot see from the record that the appellant was injured thereby. *Devoe v. Singleton*, 68.
4. Where a question would be proper on cross-examination, provided there was any testimony in chief on which to base it, the refusal of the trial Court to allow a witness to be asked the question will not be considered error when the record does not disclose the existence of such testimony. *Ibid.*
5. No appeal lies from the determination of a Circuit Court that a lot in the waters of this State, located and appropriated by a party under Code Art. 72, sec. 39, for the purpose of bedding oysters, is a natural bed or bar of oysters, and setting aside his location. *Jackson v. Bennett*, 76.

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6. No appeal lies by a municipal corporation from an order of a Judge of a Circuit Court, in a *habeas corpus* proceeding, discharging the petitioner from custody under a commitment issued by a Justice of the Peace on a judgment convicting him of violating an ordinance of the municipality. *Mayor, etc., of Annapolis, v. Howard*, 244.
7. The provisions of Code, Art. 5, sec. 81, providing for an appeal to the Circuit Court by any person aggrieved by an order or decision of the County Commissioners, does not embrace an appeal from the action of the County Commissioners in removing a road supervisor. *Miles v. Stevenson*, 358.
8. A judgment will not be reversed because an instruction given by the trial Court assumes a fact which ought to have been left to the jury to find, when no special exception was taken to the instruction on this ground. *Badart v. Foulon*, 579.

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If the assault was provoked by the language used by the plaintiff, the jury is authorized to consider such provocation in mitigation of damages. But when the fact that he used such language is denied by the plaintiff, the jury cannot be instructed that from all the evidence in the case, the plaintiff is not entitled to recover exemplary damages. *Balto. & Ohio R. R. Co. v. Barger*, 23.

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## ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where, after an assignment for the benefit of creditors has been executed and recorded, but before a bond has been filed by the trustee, as required by Code, Art. 16, sec. 205, an attachment is laid upon the property of the debtors, the lien of such attachment is not affected by the subsequent filing of the bond. *White v. Pittsburgh Nat. Bank of Commerce*, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*

2. Where an assignment for the benefit of creditors has been made, a creditor who holds collateral security for the debt due him is not entitled to demand from the trustee a dividend on the whole amount of his claim without deducting therefrom the value of such collateral security. *Nat. Union Bank v. Nat. Mechanics' Bank*, 371.
3. A creditor who has sold the collateral held by him, after the assignment and before distribution by the trustee, is required to credit his claim with the net proceeds of such sale, and is only entitled to a dividend on the balance remaining due. *Ibid.*
4. And if in such case the creditor does not sell the security held by him, the value thereof should be ascertained by proof and credited on his claim before distribution is made. *Ibid.*
5. When the assignment has been made by a firm, a party who is both a creditor of the firm and of the individual members is not estopped to claim that certain real estate is individual and not firm property, because he recommended to the Court the ratification of the sale of such real estate, when the person claiming such estoppel had induced the creditor to sign the recommendation by an assurance that his claim, then filed against the real estate as individual property, would not be affected. *Ibid.*

See INSOLVENCY.

## ATTACHMENT.

1. A voucher or account in an attachment against a non-resident, simply stating an indebtedness of the defendant, without showing on what account, whether for goods sold, money borrowed, or otherwise, is insufficient. *Burk v. Tinsley*, 98.
2. Where a payment or transfer of property has been made by insolvent merchants, with intent to create a preference, and a general creditor issues attachments on original process, causing the same to be laid in the hands of the parties receiving the preferences, then, if the said merchants are subsequently adjudicated insolvents, within the time prescribed by law, the trustee in insolvency will take such property or money, subject to the inchoate lien of the attaching creditor. *Willison v. First Nat. Bank of Frostburg*, 196.
3. In an attachment against a non-resident, an affidavit by the plaintiff that the defendant "is not a citizen of the State of Maryland and doth not reside therein," is a substantial compliance with Code, Art. 9, sec. 4, requiring the affidavit in such case to state that the plaintiff "knows, or is credibly informed and verily believes, that the defendant is not a citizen of the State, and that he doth not reside therein." *Gunby v. Porter*, 402.

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**BILL OF EXCEPTIONS.**

1. Where an exception is taken to a question asked of a witness on cross-examination to impeach his credibility, his testimony in chief should be set forth in the bill of exceptions, in order that the Appellate Court may determine whether the appellant was injured by the ruling of the trial Court. *McLaughlin v. Mencke*, 83.
2. A bill of exceptions to the ruling of the Court below, which is not signed by the trial Judge, will not be considered on appeal. *Central Ry. Co. v. Coleman*, 328.
3. Where an unsigned bill of exceptions is connected by apt reference in a succeeding bill, the Court will consider its recitals of facts, but not the ruling excepted to. *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 563.
4. A prayer assuming a fact which ought to have been left to the finding of the jury must be specially excepted to. *Badart v. Foulon*, 579.
5. A bill of exceptions must set forth the purport of the answer made by a witness to a question excepted to, in order that the Court of Appeals may see that the appellant was injured by the ruling complained of. *Devoe v. Singleton*, 68.

See **APPEAL**, 1.

**BILLS AND NOTES.**

1. When the banker on whom a check is drawn subsequently becomes insolvent, the want of due diligence by the payee of the check, or his collecting agent, in presenting the same for payment, does not discharge the drawer when it is shown that the latter was not injured by the delay, and that if due diligence had been used the check would not have been paid. *First Nat. Bank of Grafton v. Buckhannon Bank*, 475.

BILLS AND NOTES—*Continued.*

2. If a check be drawn on a bank situated in another place, it should, at the latest, be mailed for presentment on the day after it is received, and should be presented at the place of payment on the day after it arrives there. *Ibid.*
3. The defendant bank gave to the plaintiff bank, in West Virginia, a check on N. & Sons, bankers in Baltimore, with whom defendant had a deposit. Plaintiff received the check on January 12, and on the same day mailed it for collection to a bank in Philadelphia, which received it on January 13, and forwarded it for collection to a Baltimore bank, by which it was received on January 14. At one o'clock on that day the check was presented to N. & Sons for payment. They drew a check on the Western Bank in settlement and received the check drawn on them. Thirty minutes afterwards N. & Sons suspended business and closed their doors. Their check was afterwards presented for payment to the Western Bank, on the same afternoon, during banking hours, and payment was refused. Had the plaintiff's check been presented to N. & Sons on January 13, or before noon on January 14, it would have been paid, but at the time they gave their check on the Western Bank they had no funds there and the check was of no value, and they themselves could not then pay plaintiff's check on them. *Held,*
  - 1st. That since the plaintiff was under no obligation to forward the check on N. & Sons until the day after its receipt, viz., January 13, the fact that it was sent through Philadelphia did not cause it to reach Baltimore later than plaintiff was bound to have it there.
  - 2nd. That since the plaintiff bank had, through its collecting agent, until the close of business on January 15, to present the check for payment, it was guilty of no negligence in not presenting it prior to noon on January 14.
  - 3rd. That since N. & Sons were unable to pay the check when it was presented, the surrender thereof and acceptance of the substituted check caused no injury to the defendant, and, as the substituted check was valueless, the mere failure to present it for payment within thirty minutes likewise produced no injury to the defendant. *Ibid.*

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## CARRIERS OF PASSENGERS.

1. In an action by a passenger to recover damages for an assault on him by the conductor of defendant's train, evidence that on some other occasion, the time and circumstances of which are not mentioned, the plaintiff had used abusive and profane language to the conductor and made threats against him is not admissible. *Ballo. & Ohio R. R. Co. v. Barger*, 23.
2. There may be cases in which the conduct of a passenger towards an employee is such that the carrier would not be liable for an assault committed by the employee. But the mere fact that a passenger uses abusive and profane language to a conductor, does not justify an assault by him, and the carrier is liable for his act. *Ibid.*
3. Under the circumstances of this case an instruction that the jury are "at liberty to consider the violent character of the defendant's conduct and the outrage to the feelings of the plaintiff and thereupon award such exemplary or punitive damages as the circumstances may in their judgment require" was correct. *Ibid.*

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1. If a justice of the peace, who has jurisdiction of the subject-matter, subsequently proceeds irregularly or erroneously, the appropriate remedy is by appeal, and a writ of *certiorari* does not lie in such case. *Weed v. Lewis*, 126.
2. The writ of *certiorari* will only be issued when it is alleged and appears in a *prima facie* manner that the inferior tribunal is without jurisdiction. *Ibid.*

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See CONTRACTS, 6.

## CONSTITUTIONAL LAW.

1. The Act of 1894, ch. 53, authorized the Mayor and City Council of Baltimore to regulate the sale of milk and other food products in that city. Under this statute an ordinance was passed providing for the inspection of milk offered for sale in the city of Baltimore, forbidding the sale of any milk below the standard prescribed by the ordinance, and authorizing the destruction of milk found to be impure according to that standard. *Held*, that the ordinance was valid. *Deems v. M. & C. C. of Baltimore*, 164.
2. The destruction of milk found to be impure by the Lactometer, under such ordinance, without prior judicial inquiry, is not a taking of property without due process of law. *Ibid.*
3. The constitutional guarantees concerning property and liberty are not to be construed as abridging the power of the State to pass such laws as may be necessary to protect the health and peace of society. *Ibid.*
4. A license required to be paid by certain classes of traders is not a direct tax on property within the first clause of Art. 15 of the Bill of Rights, but is a tax on the business of the trader under the last clause of that article. *Rohr v. Gray*, 274.
5. The Act of 1894, ch. 113, requiring traders in Baltimore City, who carry on business in two or more places not adjoining one another, to take out a separate license for each place, graded according to the amount of merchandise kept on hand, is valid. *Ibid.*
6. A statute imposing compulsory labor upon persons residing in the several election districts of a county for the purpose of

CONSTITUTIONAL LAW—*Continued.*

keeping the roads in repair, with the privilege of providing a substitute, or the payment of a stipulated sum in lieu of such personal service, is not a levying of taxes by the poll, within the meaning of the Constitution. *Short v. State*, 392.

7. Such law is also not in conflict with the Fourteenth Amendment of the Federal Constitution, as abridging the privileges and immunities of citizens of the United States ; that provision not being designed to control the power of the State over its own citizens. *Ibid.*
8. The title of the Act of 1894, ch. 25, was "An Act to repeal certain sections of the Local Code, title, 'Cecil County,' sub-title, 'County Treasurer,' and to re-enact the same with amendments, providing for the election of a Treasurer of said county, in the year 1895, and his appointment in the meantime." The sections repealed authorized the County Commissioners to appoint a County Treasurer, who was in turn empowered to appoint deputies. The sections as re-enacted, provided that the treasurer should be elected at the general election of 1895, and that in the meantime the office should be filled by a certain named person, who should also be the Secretary of the County Commissioners, and the office of clerk of the commissioners was abolished. *Held*, that the Act was not in violation of Art. 3, sec. 29 of the Constitution, which provides that every law enacted by the General Assembly shall embrace but one subject, and that shall be described in the title. *Dremen v. Banks*, 310.
9. Where the several provisions of a law are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject. *Ibid.*
10. Where the title of an Act states that its object is to regulate the liquor traffic in a certain town, and the Act itself provides for the total abolition of the liquor traffic within a larger territory, including the town, upon a certain contingency, such Act is in violation of the Constitution, Art. 3, sec. 29, which provides that the subject of every law shall be described in its title. *Whitman v. State*, 410.
11. The title of the Act of 1894, ch. 484, is "An Act to provide for an election to be held in the town of Cambridge, Dorchester County, to regulate the liquor traffic therein ; and repealing sections 207 to 213, inclusive, of Article 10 of the Code of Public Local Laws, title, 'Dorchester County,' sub-title, 'Liquors and Intoxicating Drinks,' so far as the same may relate to or affect said town of Cambridge ; and repealing and re-enacting, with amendments, section 218 of said Article." Under the existing law the sale of liquor within certain districts of the county was prohibited, except by druggists upon *bona fide* written prescriptions. The Act of 1894 provided

CONSTITUTIONAL LAW—*Continued.*

for holding an election on a designated day in the town of Cambridge, and if the majority of votes were for the sale, then it was made lawful for all persons to sell liquor in that town, and the former law was repealed *pro tanto*; but if a majority should be against the sale, then the sale of liquor in said town, and in Election District No. 7, including said town, was prohibited even by druggists. There was nothing in the record to show what the result of the election was, but the defendant, a druggist, was indicted for selling liquor in said town. *Held*, that assuming that the result of the election was a majority against the sale, then that part of the Act of 1894, prohibiting the sale of liquor by druggists upon *bona fide* prescriptions, was invalid, because in violation of Art. 3, sec. 29 of the Constitution, since the title of the Act relates to the regulation of the liquor traffic in the town of Cambridge, and does not disclose a purpose totally to abolish the same within a larger territory, including the said town. *Ibid.*

12. An Act of the Legislature, the effect of which is simply to levy a tax on the citizens of a certain county to pay certain residents of that county the debts due them by an insolvent railroad company, is unconstitutional, because it involves taxation for a private purpose. *Balto. & Eastern Shore R. R. Co. v. Spring*, 510.
13. Counties have no inherent power of taxation, and the Legislature can only delegate to them the power to tax for public purposes. *Ibid.*
14. The Act of 1892, ch. 295, authorized the Commissioners of Talbot County to issue bonds to the amount of \$25,000, "to pay a subscription" of the county to the B. & E. S. R. Co.; and provided that the proceeds of the sale of the bonds should be first applied to the payment of the claims of the citizens of Talbot County against said company. This Act was confirmed by the Act of 1894, ch. 152. At the time of the passage of the Act of 1892, Talbot County had not in fact made any subscription, either to the stock or to the bonds of the company, and the railroad had then been completed, but was insolvent and in the hands of a receiver. *Held*, that the Act was unconstitutional, and that an injunction should be issued restraining the County Commissioners from issuing the bonds. *Ibid.*

See ELECTIONS AND VOTERS, 3.

TURNPIKE COMPANIES, 5.

## CONSTRUCTION OF STATUTES.

See STATUTES OF WILLS.

See DEVISE AND LEGACY, TRUSTS AND TRUSTEES.

## CONTRACTS.

1. When the contract sued on is in a foreign language, the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language; and the original contract is admissible in evidence together with the translations of the witnesses. Where there are two or more versions, it is for the jury to determine which one is correct. *Badart v. Foulon*, 579.
2. Where defendant's own testimony shows that he had signed a certain contract; that it was in the plaintiff's possession with his knowledge; that he had received plaintiff's money under it; that he had written her a letter suggesting a modification of it; that he had paid money under it to her agent, he cannot be allowed to deny that contract had been delivered. *Ibid.*
3. If one party agrees to work on the farm of another for a share of the crops, he is not entitled to recover wages. *Rose v. Buscher*, 255.
4. Plaintiff entrusted a sum of money to the defendant to be deposited for him in bank, the parties being at the time engaged in farming on shares land belonging to the defendant. In an action to recover such sum, the defendant is entitled to deduct only such amounts as he has paid by the authority of the plaintiff, and is not entitled to deduct payments made by him on account of the farming operations, which are barred by limitations. *Ibid.*
5. Where one party agrees to perform certain work upon machinery, and the plaintiff, with the concurrence of all the parties, agrees to complete the work according to that contract and be entitled to the payment promised the original party, the plaintiff's rights and liabilities are the same as those of the original contractor. *Crook v. B. & O. R. R. Co.* 338.
6. A contract for a certain machine, warranted to be capable of doing specified work, was made by A. with the Receiver of a corporation; and subsequently Receiver's certificates of indebtedness to the amount of the contract price were issued, upon the faith of a guaranty by the plaintiff to perform A.'s contract. The machine was not put in running order according to the contract, and was sold under a decree. *Held*, that the plaintiff was not entitled to enforce payment of the certificates, since the condition upon which they were issued was not performed. *Ibid.*
7. When a deed is executed and accepted in pursuance of a contract to sell land, the presumption is that it is a performance of the entire contract, and that the original agreement becomes null. *West Boundary Real Estate Co. v. Bayless*, 495.

See SPECIFIC PERFORMANCE.

## CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 4, 6, 10, 15.

## CORPORATIONS.

1. Where a corporation is formed under the general law, no further proof is required to show that the persons who signed the articles and applied for the charter have accepted the same, than their compliance with the provisions of the statute.  
*Glymont Co. v. Toler*, 278.
2. The stockholders of a certain corporation, instead of amending their charter in the manner agreed upon by all of them, including the defendant, applied for and obtained a new charter, identical in terms with the proposed amendment, and differing but little from the old charter. In adopting the new charter, the trustees were directed to convey the property of the old company to the new one upon the latter's assuming all liabilities and issuing to each shareholder of the former company a certificate of stock in the new company equal to his paid up stock in the old company. The new company was first formally organized in the District of Columbia, but subsequently held meetings, &c., in Maryland. Defendant, the owner of certain shares of stock in the old company, refused to exchange them for stock in the new company, but he attended stockholders' meetings, took part in the discussions, and objected to the exchange of his stock on account of his opposition to some of the officers of the new company.  
*Held*,
  - 1st. That the transaction in this case did not amount to a sale of the property of one corporation to another foreign corporation in exchange for its stock.
  - 2nd. That although the new company may have been first organized in the District of Columbia, yet a subsequent organization in this State and operations under the charter render the same valid.
  - 3rd. That by his conduct the defendant must be treated as having assented to the acceptance of the new charter by the stockholders, with the knowledge that such acceptance was upon the condition that certificates of stock under such charter were to be issued in lieu of the former stock.
  - 4th. That the defendant should be ordered to surrender his certificate of stock in the old company, and accept in lieu thereof a like certificate in the new company. *Ibid*.
3. Neither the directors nor a majority of the stockholders of a corporation have the power to make fundamental changes in the charter, inconsistent with the objects for which it was granted; nor have they the power, upon the dissolution of the company, to sell its property to another corporation and compel the shareholders to take stock in that company. *Ibid*.

CORPORATIONS—*Continued.*

See MUNICIPAL CORPORATIONS.

TAXATION, 4.

TURNPIKE COMPANIES.

## COUNTIES.

The jurisdiction of the Circuit Court for Anne Arundel County extends to the channel of the Patapsco River. *Acton v. State*, 547.

## COUNTY COMMISSIONERS.

See APPEAL, 1-7.

HIGHWAYS AND STREETS, 8-13.

INJUNCTIONS, 3.

MANDAMUS.

OFFICE AND OFFICERS.

## COURTS.

See FRAUD.

## CREDITOR'S BILL.

1. A creditors' bill to subject the real estate of a decedent to the payment of a mortgage debt must allege that the personal estate of the decedent is insufficient for the payment of his debts. *Macgill v. Hyatt*, 253.
2. Where a creditors' bill is filed for the sale of a deceased debtor's real and personal estate, the general rule is that the personal representatives of such debtor must be made parties. *Ibid.*
3. A creditor of a decedent is not entitled to maintain a bill in equity to administer the deceased's estate, because the whole of it, both real and personal, belongs to his children, when there is no allegation of the insufficiency of the personal estate, and in the absence of any attempt to invoke the aid of the Orphans' Court. *Ibid.*
4. Plaintiff, the mortgagee of a deceased debtor, the mortgage being overdue, was in the possession of the property. The executor of the mortgagor died without having made any return to the Orphans' Court, and no administrator *c. l. a.* was appointed. Plaintiff, without foreclosing the mortgage or taking any steps in the Orphans' Court, filed a general creditors' bill against the sureties of the deceased executor and the children of the deceased mortgagor praying for an account of the whole estate and the application of the same to the payment of all debts. *Held*, upon demurrer, that the bill should be dismissed. *Ibid.*
5. In such case the plaintiff should have proceeded in the Orphans' Court to have an administrator *d. b. n. c. l. a.* ap-

**CREDITOR'S BILL—Continued.**

pointed, who could have obtained and distributed the estate of the deceased mortgagor without the aid of a Court of Equity, or, if the personal estate proved insufficient, the plaintiff should have sold the mortgaged property and claimed from the general estate only for the deficiency. *Ibid.*

**CRIMINAL LAW.**

1. Upon the trial of an indictment for an assault with intent to kill, it is not competent, on cross-examination, to ask the prosecuting witness, upon whom the assault was made, whether he had not, within a year, pointed a weapon at a third party with the intention of shooting him. *Jenkins v. State*, 72.
2. Where there is no evidence of any hostile demonstration against the traverser at the time of the assault, but his sole reliance for a justification of the attack is that on the preceding day the prosecuting witness uttered threats against him, he cannot be asked what interpretation he put upon the language then used by the prosecuting witness. *Ibid.*
3. In a criminal information the venue is sufficiently laid when the county is named in the margin and the place where the offence was committed is named in the information as being in the county aforesaid. *Acton v. State*, 547.

**CROPPERS.**

See **CONTRACTS**, 3.

**DAMAGES.**

See **ASSAULT**.

**NEGLIGENCE.**

**DEBTOR AND CREDITOR.**

See **CREDITOR'S BILL**.

**FRAUDULENT CONVEYANCES**, 2.

**DECLARATORY DECREE.**

See **EQUITY**, 6.

**DELIVERY.**

See **CONTRACTS**, 2.

**DEMAND.**

See **INSURANCE**, 7.

**BILLS AND NOTES**, 2

**DEPOSITIONS.**

Where one party to a cause gives more than five days notice to the attorney of the other party that the testimony of non-resident witnesses will be taken at a designated time and



DEPOSITIONS—*Continued.*

place before a notary public, and the attorney of the other party attends the taking of the evidence, the depositions are admissible under Code, Art. 35, sec. 16. *Jackson v. Jackson*, 176.

## DEVISE AND LEGACY.

1. A testator bequeathed a sum of money to his daughter A., to be invested and held in trust by a trustee, with a limitation over in case A. should die without issue. *Held*, that A. took an absolute interest defeasible upon her dying without issue living at her death, and such property cannot pass under her will in the event of her so dying. *Hutchins v. Pearce*, 434.
2. In such a bequest, the time to which the dying without issue refers is that of the death of the legatee and not of the testator. *Ibid.*
3. Where the property given by the codicil is merely in substitution of that given by the will, it is taken with all its accidents. *Ibid.*
4. By his will a testator bequeathed a sum of money to a trustee to be invested for the benefit of his daughters A. and B., and provided that in case they should die without issue, then such portion "shall become part of my estate and be divided between my surviving heirs." By a codicil, the testator annulled that part of his will directing the trustee to invest a sum of money for his daughters, and "in lieu thereof" gave to his daughter A. certain ground rents, without expressly making them subject to the limitation over, and by the next clause gave to his daughter B. certain other rents, adding "the same rents to be held in trust as directed in my foregoing will." A. died without issue, leaving a will by which the residue of her estate was given to the plaintiff. *Held*, that the devise of the ground rents to A. in the codicil must be read into the will; that she took in them an equitable estate in fee, subject to be defeated in the event of her dying without issue living at the time of her death, and that consequently the rents did not pass under her will. *Ibid.*
5. Under wills executed before the Act of 1894, ch. 438, the personal estate is the primary fund for the payment of legacies, and they are never charged upon the real estate unless such appears to have been the intention of the testator. *Pearson v. Wartman*, 528.
6. The mere fact that the testator gives a legacy to one person, and then gives the rest and residue of his estate to another, does not show an intention to charge the legacy on the real estate. *Ibid.*
7. In a will executed before 1894, the testator, after giving a life-estate in all his property to his wife, gave upon its termina-

DEVISE AND LEGACY—*Continued.*

tion certain pecuniary legacies and then devised to other parties "the remaining portion of my estate." The personal estate was insufficient to pay the legacies. *Held*, that the legacies could not be charged on the land. *Ibid.*

See EQUITY, 6.

POWERS.

TRUSTS AND TRUSTEES.

## DIVORCE.

See MARRIAGE AND DIVORCE, 11

## DOWER.

1. Where a widow consents to a sale of her deceased husband's real estate discharged of her dower right, she is entitled under Code, Art. 16, sec. 43, to a fixed proportion of the net proceeds of such sale, and a Court of Equity has no power to change that proportion. *Stein v. Stein*, 306.
2. Where in such case the widow does not consent to the sale, she may have her dower laid off under the statute, but if this is not done, the sale must be made subject to her right of dower. *Ibid.*
3. The widow cannot consent to the sale and at the same time claim a larger proportion of the proceeds of sale than is allowed by the statute in the case of her assent. *Ibid.*
4. A widow was entitled to dower in certain property, directed by the will of her husband to be divided into four equal parts, which were then given in trust for the testator's children. A sale of the property was necessary in order to carry out the provisions of the will. *Held*,
  - 1st. That the trustees appointed to make sale of the property for the purpose of division, had no power to sell the same free from the widow's dower, without her consent, upon awarding her for life one-third of the income to be derived from the invested proceeds of sale.
  - 2nd. That if the widow should consent to the sale, she would not be entitled for life to one-third of the income to be derived from such proceeds. *Ibid.*

## DYING WITHOUT ISSUE.

See DEVISE AND LEGACY, 1-4.

## EASEMENTS.

See TURNPIKE COMPANIES, 4.

## ELECTIONS AND VOTERS.

1. Officers of registration for the counties are authorized, under the Act of 1892, ch. 573, to register voters who make appli-

ELECTIONS AND VOTERS—*Continued.*

- cation when such officers sit for the revision of the registry list in October. *Blackford v. Robinson*, 419.
2. The entries made by a Register of Voters concerning the qualifications of a voter, are the findings of an officer charged with the duty of ascertaining their correctness, and they should not be disturbed until their falsity is established by evidence. *Langhammer v. Munter*, 518.
  3. It is not necessary, under Constitution, Art. 1, sec. 1, that a voter should have the same fixed house of residence for the prescribed period of six months; it is sufficient if he resides anywhere, or in any number of places within the voting district for the required time. *Ibid.*
  4. Temporary absence from one's home, with a continuous intention to return, will not deprive one of his residence. *Ibid.*
  5. Upon a petition to strike from the registry list the name of a certain voter, registered as having lived for four years in a certain ward, the evidence showed that his name was not upon the police census of voters; that he did not live at the particular house given as his residence, but had occasionally slept there and had received the permission of the occupier of the house, who had known him for years, to register therefrom; that a *subpoena* for him had been returned *non est*, and that he was a seafaring man. *Held*, that the evidence was not sufficient to authorize the Court to strike his name from the list of voters. *Ibid.*

## EMPLOYEE.

See INSOLVENCY, 8.

## EQUITY.

1. A trustee's sale, fairly made, will not be set aside because a person unknown to the auctioneer or to the trustee, wrote a letter on the day of the sale to the auctioneer authorizing a higher bid to be made, and enclosing the required deposit, when such person is not present at the sale, and the trustee is not aware that he would be able or willing to make the first cash payment and give security for the deferred payments, and when the party objecting to the ratification of the sale is a former purchaser of the property who had failed to pay all of the purchase money, the re-sale being at his risk. *Thomson v. Ritchie*, 247.
2. *Held*, upon the facts of this case that an exception to the ratification of the trustee's sale upon the ground of inadequacy of price should not be sustained. *Ibid.*
3. A bill in equity to remove a cloud from a title cannot, as a general rule, be maintained, unless the plaintiff has both title and possession. If the possession of the land is in another,

EQUITY—*Continued.*

his remedy is by an action of ejectment. *Helden v. Hellen*, 616.

4. M. executed a deed of trust of land to the defendant to secure the payment of certain promissory notes given by the grantor to a third party. Subsequently a judgment against M. was obtained by A., upon which an execution was issued, and the interest of M. in said land was sold to A., who received a deed from the sheriff conveying said interest. A. then conveyed the land to the plaintiff, who filed a bill alleging that the original grantor, M., was never indebted to the payee of the notes; that the deed of trust to the defendant was made in fraud of the rights of the creditors of M., and praying that the same be vacated as a cloud on plaintiff's title, and that the notes mentioned in said deed be brought into Court and cancelled. The bill did not allege that the plaintiff was in possession of the land or that he was a creditor of M. at the time of the execution of the deed of trust. Upon a demurrer to the bill, *Held*, that the plaintiff was not entitled to have the deed of trust vacated as a cloud on his title, in this proceeding, but should be left to his remedy at law. *Ibid*.
5. Where land is sold under a decree and there is no direct proof of the age of a person entitled to a life estate in one-half thereof, in order to ascertain the amount to be allowed for that interest, the Auditor is justified in assuming that such person is more than sixty years of age, when it is proved that he was married forty-six years before the date of the audit. *McLaughlin v. McLaughlin*, 115.
6. A Court of Equity will not entertain a suit to construe a will, or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain. *Wahl v. Brewer*, 237.
7. Where property is devised to one for life with remainders over, the question whether the remainders are vested or contingent will not be determined during the life of the life-tenant and before the time arrives for the distribution of the estate, when there is no necessity for a present adjudication of the question. *Ibid*

## Se CREDITORS' BILLS.

INJUNCTIONS.

PRACTICE IN EQUITY.

SPECIFIC PERFORMANCE.

VENDOR AND PURCHASER.

WITNESSES.

## ESTATES.

One tenant in common, who occupies the common property, is not liable to his co-tenants for use and occupation, unless

ESTATES—*Continued.*

there has been an actual ouster of the co-tenants. *McLaughlin v. McLaughlin*, 115.

See MERGER.

## ESTOPPEL.

1. When an assignment for the benefit of creditors has been made by a firm, a party who is both a creditor of the firm and of the individual members is not estopped to claim that certain real estate is individual and not firm property, because he recommended to the Court the ratification of the sale of such real estate, when the person claiming such estoppel had induced the creditor to sign the recommendation by an assurance that his claim, then filed against the real estate as individual property, would not be affected. *Nat. Union Bank v. Nat. Mechanics' Bank*, 371.

## EVIDENCE.

1. The Court cannot take judicial notice of the law of another State. *Jackson v. Jackson*, 176.
2. A medical witness is competent to testify whether a certain woman had ever been delivered of a child before the one at whose delivery he was her attendant physician. *Ibid.*
3. Declarations of a person, not shown by evidence *alimunde* to be related to a certain man, are not admissible to establish the relationship of a third person to him. *Ibid.*
4. In an action on a written contract, it is admissible in evidence if set forth in the declaration according to its legal effect. *Caledonian Ins. Co. v. Traub*, 214.
5. The Court cannot take judicial notice of the result of a local option election directed to be held by an Act of Assembly, and upon the result of which the efficacy of the Act is made to depend. *Whitman v. State*, 410.
6. The Court does not take judicial notice of municipal ordinances, and in a declaration relying on them they should be more particularly referred to than by number and date. *Shaw-feller v. Mayor & C. C. of Baltimore*, 483.
7. The Court will take judicial notice of the civil divisions of the State created by statute. *Acton v. State*, 547.
8. Where a lot of ground assessed for benefits from the opening of a street is below the level of the same, and an appeal is taken by the property owner from the assessment of benefits, evidence tending to show the cost of filling the lot to the level of the established grade is relevant, when it has been testified that the proper mode of determining the increase of value is by considering such cost. *Mayor & C. C. of Baltimore v. Smith & Schwartz Brick Co.*, 458.

EVIDENCE—*Continued.*

9. The evidence in such case should be directed to proof of the market value of the land in its present condition, and then to the question how much will that value be increased by opening the street. *Ibid.*
10. In order to ascertain the market value of a lot of ground, evidence of prices paid for similar land in the vicinity, at voluntary sales, within a reasonable time, is admissible. *Ibid.*
11. The opinions of witnesses acquainted with the land in question, and having sufficient knowledge of the subject, are admissible to prove its market value, and the question whether a witness is qualified to give an opinion must be left in a large measure to the discretion of the trial Court. *Ibid.*
12. The general rule is that parol evidence of antecedent negotiations is not admissible to affect the terms of a deed, except where it is impeached for fraud, accident or mistake, or where the deed is shown to have been only a part execution of the contract. *West Boundary Real Estate Co. v. Bayless*, 495.
13. Where the contract sued on is in a foreign language, the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language; and the original contract is admissible in evidence, together with the translations of the witnesses. Where there are two or more versions, it is for the jury to determine which one is correct. *Badart v. Foulon*, 579.
14. A document in which a party describes himself as agent of the plaintiff is not admissible in evidence on the offer of the defendant, unless there is evidence that such party was authorized to contract on behalf of the plaintiff; and it is irrelevant to inquire whether the plaintiff had an opportunity to object to it or not. *Ibid.*
15. Where the parties have put their whole agreement in writing, no evidence of antecedent letters and negotiations is admissible. *Ibid.*

See CARRIERS, 1.

CONTRACTS, 1.

CRIMINAL LAW, 1, 2.

DEPOSITIONS.

MARRIAGE AND DIVORCE.

EXAMINER IN EQUITY.

See PRACTICE IN EQUITY, 1.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

## EXECUTIONS.

Seventeen years after a judgment was rendered in the Circuit Court of Queen Anne's County, and after the defendant had removed from that county, a *scire facias* was issued reviving the judgment, and a *fiery facias* issued to the county of the defendant's residence. Defendant had no notice of the *scire facias* until after the execution was issued and then moved to quash the writ for several reasons, one of which was that the original judgment had been paid. *Held*,

1st. That the defendant was entitled to have an opportunity to plead the Statute of Limitations to the original judgment.

2nd. That the execution should not be quashed on the motion, but a suspension of proceedings under it for a reasonable time should be ordered, so as to allow the defendant to move in the Circuit Court for Queen Anne's County to strike out the judgment of *fiat*, and for leave to plead to the *scire facias*. *Jones v. George*, 294.

See EQUITY, 4.

## EXECUTORS AND ADMINISTRATORS.

1. Letters of administration were granted to a son of an intestate upon his *ex-parte* application and statement that there was no other son. There was, in fact, an elder son and two daughters, but no widow of the intestate. *Held*, that the letters so granted should be revoked, and the Orphans' Court should proceed as if this administration had never taken place. *Lutz v. Mahon*, 233.
2. A voluntary renunciation of the right to administer, once made, cannot afterwards be withdrawn. *Ibid*.
3. In 1856, M. then being the owner of a leasehold lot, conveyed the same to B. by a deed in fee, which was not recorded for more than six months after its date. In 1875 the children of B., then deceased, procured a deed of the lot to themselves from M., in which it was described as leasehold. *Held*, that the deed to B. became operative by virtue of the Curative Act of 1860 (Code, Art. 2, sec. 19); that the deed from M. to B.'s children could not convey anything, since M. had divested himself of all title by the former deed; that since, at the time of the conveyance to B. by M., the latter had only a leasehold interest, B. acquired that only; and that in order to vest title in B.'s children, administration on B.'s estate was necessary. *Barnitz v. Reddington*, 622.

See CREDITORS' BILL, 5.

ORPHANS' COURTS, 5.

## EXPERTS.

See EVIDENCE, 2.

HIGHWAYS AND STREETS, 7.

TURNPIKE COMPANIES, 6.

## FORFEITURES.

See INSURANCE, 8-10.

## FRAUD.

When a judicial act has been obtained by fraudulent means, the Court must condemn the means and annul the result obtained by them. It will never speculate as to whether the same result may not be reached again under different circumstances. *Lutz v. Mahan*, 233.

## FRAUDULENT CONVEYANCES.

1. A conveyance by an insolvent debtor of his tangible property to a trustee for the benefit of his wife for a grossly inadequate consideration is fraudulent and void as to his existing creditors, but will be allowed to stand as security for the value of the wife's separate estate acquired by the grantor as a part of the consideration for the deed. *Hull v. Deering*, 424.
2. A creditor of a firm is not entitled to assail a voluntary deed of his property by one of the partners because fraudulent as against creditors, unless he shows that the firm assets are insufficient to pay the firm creditors, and that there are no individual creditors of such partner, or that the individual property is more than sufficient to pay them in full. *Ibid.*

See EQUITY, 4.

INSOLVENCY.

## GUARDIAN AND WARD.

An Orphans' Court of this State which has appointed a guardian of an infant then residing here is authorized to require him to transfer the property of the ward to a guardian subsequently appointed in another State, where the infant now resides. *Bernard v. Equitable, &c., Co.*, 118.

See TRUSTS AND TRUSTEES, 6.

## HABEAS CORPUS.

See APPEAL, 6.

## HEALTH.

See CONSTITUTIONAL LAW, 1-3.

## HIGHWAYS AND STREETS.

1. Where a party appeals under Baltimore City Code, Art. 48, sec. 10, from the assessment of benefits in the award of the Commissioners for Opening Streets, the question as to the amount of damages awarded to the same party for opening the same street is not open to review on such appeal. *Mayor & C. C. of Baltimore v. Smith & Schwartz Brick Co.*, 458.
2. The burden of proof in such case is on the city to establish the



HIGHWAYS AND STREETS—*Continued.*

amount of benefits accruing to the land of the abutting owner by the opening of the street. *Ibid.*

3. The trial Court cannot be required to permit the book of the proceedings of the Commissioners, in regard to the opening of the street, to be taken to the jury room. *Ibid.*
4. Where a lot of ground assessed for benefits from the opening of a street is below the level of the same, and an appeal is taken by the property owner from the assessment of benefits, evidence tending to show the cost of filling the lot to the level of the established grade is relevant, when it has been testified that the proper mode of determining the increase of value is by considering such cost. *Ibid.*
5. The evidence in such case should be directed to proof of the market value of the land in its present condition, and then to the question how much will that value be increased by opening the street. *Ibid.*
6. In order to ascertain the market value of a lot of ground, evidence of prices paid for similar land in the vicinity, at voluntary sales, within a reasonable time, is admissible. *Ibid.*
7. The opinions of witnesses acquainted with the land in question, and having sufficient knowledge of the subject, are admissible to prove its market value, and the question whether a witness is qualified to give an opinion must be left in a large measure to the discretion of the trial Court. *Ibid.*
8. Where parties file with the County Commissioners a petition for opening a new road, sworn to by one of them, and in subsequent proceedings adopt the same as their own, they cannot avoid any liability under Code, Art. 25, secs. 83 *et seq.*, by reason of the fact that they did not sign the petition at the end. *Smith et al. v. Goldsborough et al.*, 49.
9. The omission to sign their names at the end of the petition was a mere irregularity, and did not render the petition or the subsequent proceedings void, or prevent the County Commissioners from taking jurisdiction of the case. *Ibid.*
10. An order of the Board of County Commissioners determining that the public convenience of the community requires that the new public road, as laid down upon a survey, shall be opened, is a sufficient compliance with the provisions of the Act of 1892, ch. 426, sec. 95 A, requiring the Commissioners to select such route as will *best* promote the public convenience. *Ibid.*
11. The Commissioners may state their determinations as to the public convenience, in the order appointing the Examiners. *Ibid.*
12. The objection that the Examiners in executing the commission ignored the rights of a party alleged to be a tenant in possession of part of the land taken, cannot be considered by the

HIGHWAYS AND STREETS—*Continued.*

Court of Appeals, when there is no evidence in the record to show that he was such tenant, or that his holding was such as to entitle him to be considered. *Ibid.*

13. If the report of the Examiners was prematurely ratified by the Commissioners, that was a mere irregularity to be corrected on appeal to the Circuit Court. *Ibid.*

See APPEAL, 1, 2.

CONSTITUTIONAL LAW, 6.

NEGLIGENCE, 1-7.

TURNPIKE COMPANIES, 1-5.

## HUSBAND AND WIFE.

1. A married woman, trading as a *feme sole* trader, under Code, Art. 56, sec. 36, is not subject to the provisions of Code, Art. 47, sec. 23, relating to involuntary insolvency. *Clark v. Manko*, 78.
2. A married woman who holds a mortgage of realty and promissory notes secured thereby has no power to assign the same without the consent and concurrence of her husband, and no title passes by such assignment to a party taking with knowledge that the assignor was a married woman. *Giffin v. Blandin*, 130.
3. A married woman executed a promissory note without the joinder of her husband, and signed an order for a confession of judgment on the note, also without the joinder of her husband, upon which order judgment was entered. This judgment was subsequently revived by *scire facias*. *Held*, that the judgment was void and its execution should be restrained by injunction. *Hoffman v. Shupp*, 611.
4. A judgment against a married woman alone is void, unless the cause of action is within the statutes allowing actions at law against married women. *Ibid.*

See DOWER.

FRAUDULENT CONVEYANCES.

MARRIAGE AND DIVORCE.

## IMPEACHING WITNESS.

See WITNESS, 1.

## INDEPENDENT CONTRACTOR.

See NEGLIGENCE, 12-14.

## INDICTMENT.

See CRIMINAL LAW, 1-3.

## INFORMATION.

See CRIMINAL LAW, 3.

## INJUNCTIONS.

1. Equity has jurisdiction to restrain by injunction the enforcement of an invalid municipal ordinance, the execution of which injuriously affects private rights. *Deems v. Mayor & C. C. of Baltimore*, 164.
2. The execution of a void judgment against a married woman will be restrained by injunction. *Hoffman v. Shupp*, 611.
3. An injunction will be granted to restrain County Commissioners from issuing bonds authorized by an unconstitutional Act of Assembly. *Baltimore and Eastern Shore R. R. Co. v. Spring*, 510.

## INSOLVENCY.

1. Under Code, Art. 47, a transfer of property or payment of money to a creditor by merchants or traders then insolvent or in contemplation of insolvency, with intent to give such creditor a preference, is an act of insolvency rendering them liable to be adjudicated insolvents. *Willison v. First Nat. Bank of Frostburg*, 196.
2. No title in the property so transferred passes to the creditor, but the same will be vested in the trustee in insolvency; and the trustee is also entitled to recover from such creditor the money so paid him by the insolvents as an illegal preference. *Ibid.*
3. Where such payment or transfer of property has been made by insolvent merchants, with intent to create a preference, and a general creditor issues attachments on original process, causing the same to be laid in the hands of the parties receiving the preferences, then, if the said merchants are subsequently adjudicated insolvents, within the time prescribed by law, the trustee in insolvency will take such property or money, subject to the inchoate lien of the attaching creditor. *Ibid.*
4. Where such payment has been made by an insolvent trader, the fact that the creditor receiving the same did not know of the insolvency or of the intended preference, does not avail to prevent the transfer from being set aside under Code, Art. 47, sec. 22. *Ibid.*
5. Where a firm, being insolvent, sells its stock of goods, and thereupon returns to the purchaser a part of the purchase money to be applied by him to the payment of certain promissory notes of the firm, on which he was an endorser, an unlawful preference is created to that extent. *Ibid.*
6. Where a merchant or trader is guilty of acts of insolvency, and creates preferences forbidden by statute, an assignment for the benefit of creditors, subsequently executed by him, has no effect against the trustee in insolvency. *Ibid.*

INSOLVENCY—*Continued.*

7. A married woman trading as a *feme sole* trader, under Code, Art. 56, sec. 36, is not subject to the provisions of Code, Art. 47, sec. 23, relating to involuntary insolvency. *Clark v. Manko*, 78.
8. Code, Art. 47, sec. 15, provides that when any person or body corporate makes an assignment for the benefit of creditors or is adjudged insolvent, or has its property taken by a receiver, all moneys due for wages or salaries to clerks, servants or employees, contracted not more than three months prior thereto, shall be paid in full. *Held*, that an attorney at law employed by such person or body corporate is not an employee within the meaning of the statute, and is therefore not entitled to claim priority for the payment of his fees for professional services. *Lewis v. Fisher*, 139.

## INSURANCE.

1. Where a policy of fire insurance provided that in the event of a loss and a disagreement between the insured and the company as to the amount of the loss, the question should be submitted to appraisers, and a submission and award have been made in pursuance of the provision, then the same are admissible in evidence, and a witness should be allowed to identify them. *Caledonian Ins. Co. v. Traub*, 214.
2. In such case, if the appraisers have properly performed their duties, the award is binding upon both parties. *Ibid.*
3. A jury is authorized to find that the insurer waived the preliminary proof of loss required by the policy; if they find that the defendant company was notified of the loss, and that its agents visited the premises, took possession of the property, retaining it for several days, and subsequently offered to pay plaintiff the amount of an award, and denied its liability on other grounds than the absence of proof of loss. *Ibid.*
4. In an action on a policy of fire insurance where there is evidence from which the jury may infer that the defendant had waived the preliminary proofs of loss of the character required by the policy, a prayer instructing the jury that the plaintiff cannot recover unless such preliminary proof was furnished, is erroneous. *Ibid.*
5. And a prayer in such case instructing the jury that the plaintiff cannot recover if he did not furnish the preliminary proof of loss required by the policy, unless the jury find that the defendant waived compliance with the policy, is erroneous, because it submits a question of law to the jury. Waiver in this case, depending upon parol evidence of circumstances, was a matter to be determined by the jury under the instructions of the Court as to what circumstances are sufficient to constitute waiver. *Ibid.*

INSURANCE—*Continued.*

6. Where the property was insured in four companies, and in an action against one it was agreed that, if the jury found for the plaintiff, the verdict should be for the full amount of the loss, which would be apportioned among the companies, and judgment entered against each company for its proportionate loss, then a prayer instructing the jury that the plaintiff can only recover such proportion of the loss that the policy sued on bears to the whole amount of the insurance on the property, is properly rejected. *Ibid.*
7. When a contract of insurance has been made, followed by loss of the goods by fire, and waiver of preliminary proof by the insurer, then a right of action accrues, and no demand of payment is necessary. *Ibid.*
8. When payment of a loss insured against is resisted on the ground that the policy was forfeited, the insurer must show both that the policy in express terms, or by clear implication, contains some provision forfeiting the policy in specified contingencies, and also that the insured has brought himself within the scope of such provision. *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 563.
9. A policy of fire insurance in a mutual company covered certain farm buildings, tan shop, bark shed, etc. On the day of the loss an engine was stationed on the premises about fifty feet from the bark mill, and used for the purpose of grinding bark. The engine had been used once a month for this purpose for more than a year and a half previously. While the engine was not running a fire broke out in the bark mill and consumed the tannery buildings and the stock in trade, but there was no evidence to show the origin of the fire. The policy prohibited the use of any steam engine temporarily employed for the purpose of threshing out crops of any kind. *Held*, that the use of an engine for grinding bark was not within the above cause of forfeiture. *Ibid.*
10. Another clause of the policy provided that in the event of an engine being stationed on the premises in proximity to the buildings insured, then the president of the company should appoint a committee to examine the same and ascertain the amount of the increased risk, and, if increased, an additional premium note should be given by the insured. Ten days before the fire the insured notified the defendant's general agent that he was using the engine as above stated, for grinding bark, and that he was willing to do or pay anything necessary for the protection of the property. The agent refused to give a permit for the use of the engine, and no committee to examine the premises was appointed. *Held*,
  - 1st. That the employment of the engine did not necessarily result in a forfeiture of the policy, but if the risk was thereby increased, and no additional premium note was given, the

INSURANCE—*Continued.*

insurer would be released from liability, unless it had neglected for an unreasonable time to make the examination provided for.

- 2nd. That it was the duty of the insurer to appoint a committee to ascertain forthwith whether the risk had been increased by the use of the engine, and a failure to do so for an unreasonable time after said notice, was no defence to plaintiff's right to recover.
- 3rd. That the notice to the general agent was notice to the company, it being his duty to communicate it, and the refusal of the agent to give the permit asked for made no difference, because no permit was needed.
- 4th. That whether the period between the date of the notice and the occurrence of the loss was a reasonable time within which the committee ought to have been appointed, was a question of fact for the jury.
- 5th. That if this was a reasonable time, and the risk was increased by the use of the engine, and loss resulted therefrom, the company would still be liable, because it could not rely upon the failure of the plaintiff to give an additional premium note, when that failure was due to the company's neglect to examine the premises.
- 6th. That if the use of the engine increased the risk, and no additional note was given, the right to recover would not be defeated, unless the loss occurred from that increased risk, and this was a question of fact for the jury.
- 7th. That if the use of the engine did not increase the risk, then the policy would not be affected. *Ibid.*
11. The above policy also provided that it should be forfeited in the event of alterations in the premises which increase the risk, or the use thereof for carrying on any trade which, according to the by-laws and conditions, class of hazards and rates annexed to the policy, would increase the risk. *Held*, that the use of the engine, as above stated, was not an alteration in the insured premises, and that it was not a carrying on of a trade which, according to the by-laws, &c., increased the hazard, because the by-laws do not so declare, and because there was no class of hazards annexed to the policy. *Ibid.*
12. Where there is no forfeiture of the policy there can be no waiver of forfeiture, and hence evidence and prayers relating to the question of waiver are properly rejected. *Ibid.*
13. Notice to a general agent of an insurance company is notice to the company. *Ibid.*

## INTOXICATING LIQUOR.

See CONSTITUTIONAL LAW, 10.  
EVIDENCE, 5.

## ISSUES.

See ORPHANS' COURT, 1-4.

## JUDGMENTS.

Upon a motion to strike out a final judgment by default, the evidence showed that the defendant, although returned summoned, had not in fact been summoned; that he had some indefinite knowledge that he had been sued, and attempted in good faith to find out who had sued him and for what cause, but was informed by the plaintiff's attorney that "it was all over." *Held*, that the judgment should be struck out. *Pattison v. Hughes*, 559.

A judgment against a married woman alone is void, unless the cause of action is within the statutes allowing actions at law against married women. And if void, the execution of the judgment will be restrained by injunction. *Hoffman v. Shupp*, 611.

See CERTIORARI.

JUSTICE OF THE PEACE.

SCIRE FACIAS.

## JUSTICE OF THE PEACE.

Code, Art. 52, sec. 21, providing that, in suits before justices of the peace, when a defendant is returned summoned and fails to appear on the return day, the justice shall fix a subsequent day for trial, does not apply to an attachment issued by a justice; but in that case judgment may be entered on the return day. *Weed v. Lewis*, 126.

See CERTIORARI, 1, 2.

## LANDLORD AND TENANT.

In 1793, the owner of a tract of land, including the lot in question, leased the whole tract for 99 years, renewable forever, to Q., subject to the yearly rent of two pounds and fourteen shillings. In the same year Q. subleased the lot in question to P., whose title by *mesne* conveyances became vested in appellants. In the sublease from Q. to P. the rent reserved was one pound four shillings *per annum*, and none of the subsequent conveyances mentioned any other rent as issuing out of the lot. There was evidence to show that for more than fifty years no other rent had been demanded from the owners of this lot. *Held*, that it was reasonable to conclude that the lot was not liable for any other rent, and that there had been an apportionment of the rent resting upon the original tract of which the lot in question was about one-fifth. *Barnitz v. Reddington*, 622.

## LEASE.

See LANDLORD AND TENANT.

## LEGACY.

See DEVISE AND LEGACY.

## LEGITIMACY OF CHILDREN.

See MARRIAGE AND DIVORCE, 3.  
ORPHANS' COURT, 4.

## LIBEL AND SLANDER.

A declaration setting forth that the defendant, maliciously intending to effect the discharge of plaintiff by his employer, did maliciously write to the employer a letter, stating defendant's displeasure at something the plaintiff was alleged to have said, described as too bad to mention, in consequence whereof plaintiff was discharged, does not set forth a good cause of action, since it does not aver that the defendant's statement concerning the plaintiff was false. *Bottomly v. Bottomly*, 159.

## LICENSES.

See CONSTITUTIONAL LAW, 4, 5.

## LIMITATIONS.

See EXECUTIONS, 1.  
SCIRE FACIAS, 2.

## LOCAL OPTION.

See EVIDENCE, 5.

## MANDAMUS.

1. A neglect to discharge a public duty, or circumstances which clearly evince an intention not to do the act required, will furnish a sufficient foundation for issuing the writ of *mandamus*. *County Commissioners of Cecil Co. v. Banks*, 321.
2. An Act of Assembly appointed the petitioner Treasurer of Cecil County until the next general election, and directed that he should also serve as secretary of the County Commissioners, and have possession of all their books and papers, as well as those of the office of treasurer. The petitioner, after having qualified, demanded from the County Commissioners the possession of the books and papers belonging to the office of County Treasurer, with which demand they refused to comply, alleging that a third party then filled the office of treasurer, and that they had no power to eject him. *Held*, that since such third party was not a trespasser, but was in possession of the books, etc., as the appointee of the commissioners, and was their servant, it was the duty of the commissioners to comply with said demand, and a writ of *mandamus* was properly issued to enforce delivery to the pe-



MANDAMUS—*Continued.*

tioner of the books and papers of which the Act made him the custodian. *Ibid.*

3. The petition in this case also alleged that after the passage of the above-mentioned Act, the County Commissioners admitted a certain person to the office of County Treasurer, and delivered to him the books and papers of the office, and that he refused to deliver them to the petitioner. *Held*, that both this person and the commissioners were amenable to the writ. *Ibid.*
4. A writ of *mandamus* lies to compel a board of County Commissioners to restore to his office a supervisor of roads, whom they had removed from office before the expiration of the term for which he was appointed, upon an *ex-parte* proceeding, and for a cause not authorized by the statute creating the office. *Miles v. Stevenson*, 358.

## MARKET VALUE.

See EVIDENCE, 9-11.

## MARKETABLE TITLE.

See SPECIFIC PERFORMANCE.

## MARRIAGE AND DIVORCE.

1. In this State there cannot be a valid marriage without a religious ceremony ; but marriage may be proved by general reputation, cohabitation and acknowledgement, and when these exist it will be inferred that a religious ceremony has taken place, although evidence may not be obtained of the time, place and manner of the celebration. *Richardson v. Smith*, 89.
2. Marriage may be proved by general reputation, cohabitation and acknowledgement in all cases, except actions for criminal conversation and prosecutions for bigamy. *Jackson v. Jackson*, 176.
3. The declarations of deceased parents are competent evidence to prove the legitimacy of their children, as well as to prove their marriage at a particular time and place, but evidence that the man did not tell an intimate friend that he was married or had a child, is not admissible. *Ibid.*
4. Where the evidence as to the general reputation concerning the marriage of the parties in question is conflicting, it is competent for the jury to find the reputation according to the evidence of the plaintiff, but it is error in such case to instruct the jury that upon the evidence the law presumes that the parties were lawfully married, and the burden of proof is upon the defendant to show that they were not. Every fact stated in the prayer might have been found to be true, and

MARRIAGE AND DIVORCE—*Continued.*

yet the jury might properly have refused to sustain the marriage, because there was evidence qualifying these facts and tending to throw discredit and suspicion upon the cohabitation between the parties. *Ibid.*

5. If a marriage can be justly inferred from the facts, then the presumption is that it was lawfully contracted wherever it may have taken place, and it will make no difference if it be shown that by the law of the State where it was contracted, the same ceremony is not requisite which is prescribed by the law of this State. But the Court cannot take judicial notice of the law of another State, and no instruction to the jury concerning the same should be granted in the absence of evidence as to that law. *Ibid.*
6. Where it is attempted to prove a marriage by a general reputation, cohabitation and acknowledgment, the instructions on the one side ought to put clearly before the jury the facts in evidence from which they would be justified in finding the marriage, and on the other side the facts should be stated which would justify them in refusing to so find. *Ibid.*
7. A prayer asserting that, under the circumstances therein stated, the jury could not find a marriage from reputation, is erroneous in a case where there is other evidence to establish the marriage besides that bearing on reputation. *Ibid.*
8. A prayer asserting that if the connection between the parties was illicit in its beginning, it will be presumed to continue to be of the same character, and that this presumption can only be overcome and the marriage established by other evidence than cohabitation, is erroneous because it does not specify what other evidence was required. *Ibid.*
9. Where it is sought to prove a marriage by general reputation, the character of the woman for chastity, the circumstances under which the parties lived together, their conduct and declarations after their separation, the manner in which they were treated by their families and the community, may be taken into consideration by the jury. And evidence that the woman, after the separation, lived in a disorderly and disreputable manner is admissible. *Ibid.*
10. A witness cannot be asked whether in his opinion certain persons were married. *Ibid.*
11. On a bill for a divorce *a mensa* by a wife against her husband on the ground of cruelty of treatment, proof that the defendant had frequently used personal violence towards the plaintiff, and threatened her with great bodily harm, and had done acts injurious to the plaintiff's health, entitles her to the relief asked for. *Freeny v. Freeny*, 406.

## MARRIED WOMEN.

See HUSBAND AND WIFE.

## MASTER AND SERVANT.

See CARRIERS, 2.

INSOLVENCY, 8.

## MERGER.

Where the life interest of a party in a moiety of the land owned in common is conveyed to one co-tenant, the life estate is not thereby merged, and the purchase does not enure to the benefit of all the co-tenants. *McLaughlin v. McLaughlin*, 115.

See EVIDENCE, 12-15.

## MORTGAGES.

1. A married woman who holds a mortgage of realty and promissory notes secured thereby, has no power to assign the same without the consent and concurrence of her husband. *Giffin v. Blandin*, 130.
2. A mortgage creditor, after having exhausted his security by a sale, may come in *pari passu* with other creditors, but he should not be allowed to hold on to the mortgage security and at the same time demand payment of the mortgage debt out of the fund which should be appropriated to the claims of the unsecured creditors. *Macgill v. Hyatt*, 253.
4. Where mortgaged property is sold in pursuance of Code, Art. 66, sec. 6, under a power of sale contained in the mortgage, which authorizes the mortgagee to pay out of the proceeds of sale "all expenses incident to the sale;" neither the mortgagee nor his assignee is entitled to commissions for making the sale. *Johnson v. Glenn*, 369.

See CREDITORS' BILL, 1-4.

## MUNICIPAL CORPORATIONS.

1. A statute authorized the municipality to provide a fine of not more than one hundred dollars for each violation of an ordinance. *Held*, that an ordinance imposing a fine of not less than twenty nor more than fifty dollars was a valid exercise of the power. *Deems v. Mayor & C. C. of Baltimore*, 164.
2. The Court does not take judicial notice of municipal ordinances, and in a declaration relying on them, they should be more particularly referred to than by number and date. *Shanfeller v. Mayor & C. C. of Baltimore*, 483.
3. Ordinances of the city of Baltimore directed that a certain square should be acquired as a site for a new Court House. Plaintiff was the lessee of a hotel occupying part of the site, and all the interests in the square were purchased or condemned by the city, except the plaintiff's. No condemnation proceedings had been instituted when plaintiff sued the city to recover damages alleged to have been caused to his

MUNICIPAL CORPORATIONS—*Continued.*

business by the delay in acquiring his property. The delay complained of was from May 1, 1893, when a Building Committee was appointed by ordinance, to April 7, 1894, when the suit was instituted. The Building Committee had no power to condemn until after they had failed to agree upon a price with the land owners, and there was no allegation that they had acted in bad faith. *Held*, that the passage of the ordinances was not a commencement of condemnation proceedings, and that the plaintiff had no right of action against the municipality on account of the delay to institute such proceedings. *Ibid.*

4. When a bill in equity is filed by the city solicitor in the name of the Mayor and City Council, the presumption is, in the absence of proof to the contrary, that it was filed by their authority. *Mayor & C. C. of Baltimore v. Turnpike Co.*, 535.

See APPEAL, 6.

CONSTITUTIONAL LAW, 1-3, 5.

INJUNCTIONS, 1.

TURNPIKE COMPANIES, 5.

NEGLIGENCE.

1. The question of negligence growing out of an injury by a Street Railway Company to a person rightfully upon a public thoroughfare, is governed by principles different from those applicable to an injury inflicted by a Steam Railroad Company upon a trespasser wrongfully upon the company's right of way. *Cooke v. Baltimore Traction Co.* 551.
2. The propulsion of an electric or cable car at full speed around the corner of a street, in a populous city, without a previous look out to ascertain whether the track is clear or not, is an act of negligence. *Ibid.*
3. Plaintiff drove at night upon the track of the defendant just after crossing the street where the track turned the corner. Before doing so he looked to see if a car was approaching on that track, and neither saw nor heard one. About ten feet from the corner his vehicle was struck from behind by an electric car which had swung around the corner at full speed, without a headlight and when no bell had been rung. The motorman could have seen the plaintiff when he drove upon the track. *Held*,
  - 1st. That such facts constitute evidence of negligence on the part of the defendant.
  - 2nd. That the failure of plaintiff to see or hear the car was not contributory negligence in law, because he made every reasonable effort to look and listen. *Ibid.*
4. Where the nature of the act relied on to show negligence contributing to the injury can only be determined by considering

NEGLIGENCE—*Continued.*

- all the circumstances surrounding the transaction, it should be passed upon by the jury, and it is not for the Court to determine its quality as matter of law. *Ibid.*
5. When in an action to recover damages for an injury alleged to have been caused by the defendant's negligence, the defendant contends that the injury was caused by the plaintiff's contributory negligence, the question should not be with drawn from the consideration of the jury unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted evidence. *Lake Roland Co. v. McKewen*, 593.
  6. Although the plaintiff in this case was guilty of contributory negligence in attempting to drive across the tracks of the defendant, an electric railway company, without slack ing his speed and looking in both directions as soon as he was able to do so, in order to see if a car was approaching from either direction, yet, if the motorman of the car could have seen that the plaintiff was about to cross in front in a position of danger, and could by the exercise of reasonable care have avoided the injury, then the defendant is liable. *Ibid.*
  7. A street car has not a right of way on its tracks paramount to that of an ordinary vehicle. Neither has a right superior to that of the other, but each must exercise its right to use the street with due regard to the rights of the other. *Ibid.*
  8. There are some accidents from the nature of which a presumption of negligence arises, according to the maxim, *res ipsa loquitur*. *Howser v. Cumb. & P. R. R. Co.*, 146.
  9. Plaintiff, while walking in a footpath along the roadbed of the defendant, but not upon its right of way, was injured by half a dozen cross-ties which fell upon him from a gondola car attached to a train passing on defendant's road. Held, that these facts gave rise to a presumption of negligence on the part of the defendant. *Ibid.*
  10. In an action against a street railway company, to recover damages for a personal injury alleged to have been caused by the defendant's negligence, the evidence for the plaintiff showed that she was an old woman, very deaf, and that in attempting to cross a street she was struck by defendant's trolley car ; she testified that she heard no bell and did not see the car, and could not say how she was struck, although, before crossing the street, she had carefully looked. Other witnesses for the plaintiff testified that they were within a few feet of the place where the accident occurred ; that the plaintiff was struck by the front part of the car, and that they did not hear a bell rung. The evidence on the part of the defendant was that the place of the accident afforded an unobstructed view of approaching cars ; that the bell was rung at the crossing ;

NEGLIGENCE—*Continued.*

- that the plaintiff was not on the track or in front of the car, but that she walked into the side of the car when the same had stopped. *Held*, that since the evidence was contradictory, the question of negligence on the part of the defendant was properly left to the jury. *Central Ry. Co. v. Coleman*, 328.
11. For a mere accident, unmixed with the negligence or fault of the party to whom it is attributed, no action will lie. An accident which furnishes no cause of action, is an inevitable occurrence, not to be foreseen and prevented by vigilance and care, and not occasioned or contributed to, in any manner, by the act or omission of the company or its agents. *Washington, Colesville & Ashton Turnpike Co. v. Case*, 36.
  12. Where work is being done by an independent contractor, and an injury to a third person is occasioned by the negligence of his servants, yet the person for whom the work is done may be liable, if the injury is such as might have been anticipated by him as the probable consequence of the work let out to the contractor, or if it be of such a character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work. *City & Suburban Ry. Co. v. Moores*, 348.
  13. The use of a steam engine on a turnpike road for hauling material to be used in repairs, is not such a nuisance *per se* as would make the Turnpike Company liable to third parties for the negligence of the servants of an independent contractor, having exclusive control of the engine and the work. *Ibid.*
  14. W. was employed by a Turnpike Company to grade the road-bed, etc., and also to construct the tracks of the defendant, an Electric Railway Company, on the road. Plaintiff sued the defendant to recover damages for an injury alleged to have been caused by the negligent use of an engine under the control of W. on the tracks of the defendant. *Held*,
    - 1st. That W. was an independent contractor with the Turnpike Company, and the defendant was a party to the contract, if it be found as a fact, that the work was done for it.
    - 2nd. That the use of a steam engine in doing the work under the contracts was not a nuisance *per se*, and neither the Turnpike Company nor the defendant was liable for the negligence of the servants of W., the independent contractor, provided W. employed competent men to do the work, and they were under his exclusive control.
    - 3rd. That if the defendant company was not a party to the contracts between W. and the Turnpike Company, the mere fact that it owned the tracks on which the engine was run would not render it liable to the plaintiff. *Ibid.*

NEGLIGENCE—*Continued.*

15. Plaintiff drove in a wagon slowly across the tracks of the defendant, a street electric railway company, and was struck by a car which he first saw approaching when about three hundred feet distant. In an action to recover damages, *Held*, that the jury were properly instructed that if the plaintiff was guilty of the want of ordinary care in attempting to cross the tracks of the defendant under the circumstances of the case, then he is not entitled to recover, unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen that the plaintiff was on the track and was in danger of being struck by the car. *Baltimore Traction Co. v. Appel*, 603.
16. The evidence in this case being conflicting as to whether the motorman rang the gong before the collision, or made an effort to avoid the same after seeing that the plaintiff was in a position of peril, the plaintiff's conduct was not such contributory negligence in law as to justify the trial Court in withdrawing the case from the jury.

See TURNPIKE COMPANIES, 6-11.

## NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

## NOTICE.

See INSURANCE, 13.

VENDOR AND PURCHASER.

## NOVATION.

See CONTRACTS, 5.

## NUISANCE.

See NEGLIGENCE, 13, 14.

## OFFICE AND OFFICERS.

1. Under the local law of Somerset County, a supervisor of public roads is appointed for two years by the County Commissioners, and they are authorized to remove him from office for incompetency, wilful neglect of duty or misdemeanor in office. Before the expiration of petitioner's term of office, the County Commissioners removed him without notice, because it was alleged that his charges for work were higher than those for which another person offered to do the same work. Upon a petition for a *mandamus* to restore the petitioner to office, *Held*,
  - 1st. That the County Commissioners had no power to remove the petitioner for any other cause than one of those enumerated in the statute.

OFFICE AND OFFICERS—*Continued.*

- 2nd. That before being removed, even for any one of those causes, he was entitled to notice of the charges against him and an opportunity to be heard.
- 3rd. That the petitioner having been removed for a cause not enumerated in the statute, and without notice, the action of the County Commissioners was a nullity, and he was entitled to a writ of *mandamus* to enforce his restoration to office. *Miles v. Stevenson*, 358.
2. If the Commissioners had acted within the scope of their authority, and had removed the petitioner for any of the causes specified in the statute, after having given him due notice and an opportunity to be heard, their action would not be open to review upon an application for the writ of *mandamus*. *Ibid.*
3. It is a despotic denial of justice to strip an incumbent of his public office before its prescribed term has elapsed, except for legal cause, alleged and proved upon an impartial investigation after due notice. *Ibid.*

See MUNICIPAL CORPORATIONS, 4.

## ORDINANCES.

See MUNICIPAL CORPORATIONS.

## ORPHANS' COURT.

1. Issues sent from an Orphans' Court to a Court of law for trial ought to be framed with reference to the persons named and the matters set forth in the petition and answer. *Richardson v. Smith*, 89.
2. Such issues should not be unnecessary reduplications of the same matter. *Ibid.*
3. Where the petition asked for the issue : Whether Isabella Richardson is the widow of William Richardson ; it is error in the Orphans' Court to frame issues presenting the questions whether William Richardson was the husband of Isabella Parsons, and if yea, when, where and how was their marriage celebrated. *Ibid.*
4. A petition in the Orphans' Court asked for the issue : Whether the petitioner, Carrie Richardson, is the sister of Samuel Richardson, deceased. The issues as granted were : (1.) Is Caroline Richardson, otherwise called Caroline Parsons, the daughter born in wedlock of William Richardson and Isabella Parsons ; and if yea, when and where was the said Caroline born ? (2.) Is Caroline Richardson, otherwise called Caroline Parsons, the daughter born out of wedlock of William Richardson and Isabella Parsons ; and if yea, did the said William and Isabella, after the birth of Caroline, intermarry, and did the said William, after said marriage, if



ORPHANS' COURT—*Continued.*

any, acknowledge the said Caroline to be his child by the said Isabella? *Held*, that these issues were improperly framed, and that the issue asked for in the petition should have been granted. *Richardson v. Smith*, 94.

5. The estates of deceased persons should ordinarily be administered and finally distributed in the Orphans' Court. *Macgill v. Hyatt*, 253.
6. A sale of the real estate of an intestate, of less value than \$2,500, made under an order of the Orphans' Court having jurisdiction of the subject-matter and of the parties, cannot be impeached collaterally for mere errors or irregularities in the procedure. *Simpson v. Bailey*, 421.
7. A sale of the real estate of an intestate decedent was made by his administratrix under an order of the Orphans' Court, and the land was subsequently conveyed to the defendants. In an action of ejectment by the heirs at law of the decedent, *Held*, that although the sale should have been made by a trustee, yet the failure to do so was not such an error in procedure as would make the sale by the administratrix absolutely void, or open to collateral attack. *Ibid*.

See CREDITORS' BILL, 4, 5.

GUARDIAN AND WARD.

WILLS.

## OUSTER.

See ESTATES.

## OYSTERS.

See APPEAL, 5.

## PARTIES.

See CREDITORS' BILL, 2.

PRACTICE, 2.

## PARTNERSHIP.

1. The fact that two persons agree to farm land on shares, and one of them agrees to expend a certain sum of money in the farming operations, does not constitute a partnership. *Rose v. Buscher*, 225.
2. When at the time a partnership was formed certain real estate was the individual property of the members, and nothing was afterwards done to transfer the same to the firm, except the making of entries in the firm books, by which the real estate was treated as firm property, and the fact that the co-partners so considered it, then the proceeds of the sale of such real estate will not be treated in equity as partnership

PARTNERSHIP—*Continued.*

assets, when the question arises between the creditors of the firm and those of the individual members. *Nat. Union Bank v. Nat. Mechanics' Bank*, 371.

3. In such case, persons dealing with the members of the firm have the right, in the absence of notice to the contrary, to assume that the public records inform them correctly as to the ownership of the property, and are not bound by the private understanding between the partners themselves. *Ibid.*
4. But if the real estate was such as was necessary for the convenient conduct of the business, was put into the business as part of the common stock and treated by the partners as partnership property, and was so entered on the firm books as to comply with the Statute of Frauds, then the partnership creditors should have priority over the creditors of the individual partners in the distribution of the proceeds of the sale of such property, provided the real estate was so used as to give notice to the latter that it was treated as partnership property. *Ibid.*
5. Where real estate is purchased with partnership funds, for the use of the firm, it would be immaterial that the title stood in the names of the individual members, as a Court of Equity would treat it as firm property, and hence it would be liable to the partnership creditors to the exclusion of the individual creditors, until the former are satisfied. *Ibid.*
6. A creditor of a firm is not entitled to assail a voluntary deed of his property by one of the partners because fraudulent as against creditors, unless he shows that the firm assets are insufficient to pay the firm creditors, and that there are no individual creditors of such partner, or that the individual property is more than sufficient to pay them in full. *Hull v. Deering*, 424.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 5.  
FRAUDULENT CONVEYANCES, 2.

PASSENGERS.

See CARRIERS, 1.

PLEADING.

See LIBEL AND SLANDER.

PLEDGE AND COLLATERAL SECURITY.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2-4.

POLICE POWER.

See CONSTITUTIONAL LAW, 1, 2, 3.  
TURNPIKE COMPANIES, 5.

## POLL TAXES.

See CONSTITUTIONAL LAW, 6.

## POWERS.

Where a testator devises his estate to his executors and trustee, who are different persons, giving them a right to sell, &c., the trustee should unite with the executor in exercising the power of sale. *Poole v. Anderson*, 454.

## PRACTICE.

1. A party has a right to ask for an instruction upon segregated portions of the evidence, but the conclusions arrived at must be consistent with the truth of all the other facts in evidence. *Calladonian Ins. Co. v. Traub*, 214.
2. The same person should not appear as both a plaintiff and a defendant in the same cause, whether the proceeding be amicable or hostile. *Stein v. Stein*, 306.
3. On an appeal from the award of the Commissioners for opening streets in Baltimore City, the trial Court cannot be required to permit the book of the proceedings of the Commissioners to be taken to the jury room. *Mayor & C. C. of Baltimore v. Smith & Schwartz Brick Co.* 458.
4. When a party asks to have the jury instructed to render a special finding concerning a material fact, under the Act of 1894, chap. 185, the request should be made at the time the prayers are submitted. It is too late to present such request after the close of the argument, and when the jury are about to retire. *Baltimore Traction Co. v. Appel*, 603.

See BILLS OF EXCEPTIONS.

## PRACTICE IN EQUITY.

1. When evidence is taken before an Examiner in Equity, and a party objects to certain testimony, the Examiner should be directed to note the objection without setting forth the ground of it, except when a question is objected to as leading. But after the evidence is returned, written exceptions to the testimony, indicating the evidence excepted to, the grounds of objections and the names of the witnesses, should be filed in the cause before the hearing. It is not sufficient to except generally to "all the testimony objected to and noted by the Examiner." *Freeny v. Freeny*, 406.
2. Where a bill in equity is filed by the City Solicitor in the name of the Mayor and City Council, the presumption is, in the absence of evidence to the contrary, that it was filed by their authority. *Mayor & C. C. of Baltimore v. Turnpike Co.* 535.

## PRIVILEGES AND IMMUNITIES.

See CONSTITUTIONAL LAW, 7.

## REGISTRATION OF VOTERS.

See ELECTIONS AND VOTERS.

## RENT.

See LANDLORD AND TENANT.

## RENUNCIATION.

See EXECUTORS AND ADMINISTRATORS, 2.

## RESIDENCE.

See ELECTIONS AND VOTERS.

## ROADS.

See HIGHWAYS AND STREETS.

## SALES.

1. Where the contract for the purchase of a certain machine specifies what it shall be capable of performing, and the maker agrees to run the same for a number of days after completion to demonstrate its efficacy, such stipulations constitute a warranty which is not waived by use of the machine, and the damages sustained by a breach of the warranty may be recouped in a suit by the seller for the price. *Crook v. B. & O. R. R. Co.* 338.
2. In such case, the sale of the machine by a trustee under a mortgage executed by the buyer of all of its property is not such an acceptance of the machine as excuses the seller from a performance of his contract, or entitles him to recover the contract price. *Ibid.*

See EQUITY, 1, 2.

ORPHANS' COURT, 7.

POWERS.

## SCIRE FACIAS.

1. The remedy for any errors or irregularities in a *scire facias*, reviving a judgment, is the same as in the case of the original judgment. *Jones v. George*, 294.
2. The right to issue a *scire facias* on a judgment may be barred by limitations, but the statute must be specially pleaded. *Ibid.*
3. The revival of a judgment by *scire facias* effects no change in its nature or character. *Eavey & Co. v. Shupp*, 611.

See EXECUTIONS.

HUSBAND AND WIFE, 3.

## SIGNATURE.

See HIGHWAYS AND STREETS, 9.

## SPECIAL FINDING OF FACT.

See PRACTICE, 4.

## SPECIFIC PERFORMANCE.

1. Upon a bill for specific performance, where the defence is that the title to the property is not marketable, the Court does not decide whether the title is absolutely good or absolutely bad, but whether it is reasonably clear and free from doubt. *Levy v. Iroquois Bldg. Co.* 300.
2. It is not every doubt, or even threat of contest, that will be sufficient to defeat a demand for the specific performance of a contract to buy land, but the doubt must be a reasonable one. *Ibid.*
3. A. made a voluntary conveyance of certain property to his daughter B. in 1879, and four days later he made a will. On a *caveat* filed to this will in 1892, the same was set aside as having been obtained by fraud and undue influence exercised by B. After the filing of the *caveat*, the property so conveyed to B. was conveyed by her to the plaintiff, who agreed to sell the same to the defendant. The heirs at law of A. refused to relinquish their rights in the property, if any, but did not threaten to assail the validity of the deed from A. to B. *Held*, that since the plaintiff was a *bona fide* purchaser for value without notice, his title was free from reasonable doubt, and that specific performance should be decreed. *Ibid.*
4. When a bill is filed for specific performance, it is only under special circumstances that pecuniary compensation will be decreed in lieu of the relief asked for. *West Boundary Real Estate Co. v. Bayless*, 495.
5. A contract for the sale of land provided that the vendee should erect, within one year, a dwelling house costing not less than \$4,000, and made provision for other restrictions. The deed, as executed, did not contain this stipulation, but provided that the grantee should not, within ten years from the date of the deed, erect on said lot any dwelling house costing less than \$3,000; and the deed differed in other particulars from the contract of sale. Four months before the expiration of the year referred to in the original agreement, the grantee conveyed the property by an absolute deed to S. Upon a bill for specific performance of the contract and other relief, *Held*, that, assuming the existence of a completed contract, yet, since the deed was inconsistent in important particulars with the contract, it took the place of all antecedent negotiations, and that the plaintiff was not entitled to demand specific performance of the original contract. *Ibid.*

## STATUTE OF FRAUDS.

See PARTNERSHIP, 4.

STATUTES.

1. The grammatical construction of a statute is not always in judgment of law to be followed, particularly when by following it, and solely by reason of following it, a deliberate enactment of the Legislature would be annulled. *Drennen v. Banks*, 310.
2. If the obvious purpose of a statute is beyond the literal meaning of the language employed, it will not be restricted by the narrow signification of the words ; and in like manner, comprehensive terms will not include that which is not within the design of the statute, but the real intent will prevail over the literal sense of the language used. *Roland Park Co. v. State*, 448.
3. The result which may follow from one construction or another of a statute is a potent factor in determining the legislative intent. *Ibid.*

See CONSTITUTIONAL LAW, 8, 9, 10.

STOCKHOLDERS.

See CORPORATIONS, 2, 3.

STREET CARS.

See NEGLIGENCE, 1, 7.

SUPERVISOR OF ROADS.

See MANDAMUS, 4.

TAXATION.

1. If assessable property has been omitted from the assessment books, or has escaped assessment when it ought to have been assessed, the fact that it has not been discovered and valued and placed upon the assessment books until after the levy has been made, cannot release its owner from paying taxes on account thereof, and cannot defeat the right of the State or the municipality to collect those taxes. *Hopkins v. Van Wyck*, 7.
2. Baltimore City Code, Art. 50, sec. 5, provides that "the valuation of the property as it shall appear upon the assessors' books on the first Monday of March, shall be final and conclusive, and constitute the basis upon which the taxes for the ensuing year shall be assessed and levied." Defendant's testatrix died in March, 1892, having owned on the last day of February, 1892, certain personal property not on the assessment books on the first Monday of March. This property was subsequently discovered and placed on the books in May, 1892, ten days after the levy for that year had been made. *Held*, that such property was liable to taxation for the year 1892. *Ibid.*

TAXATION—*Continued.*

3. The origin and character of the poll taxes prohibited by the Constitution explained in *Short v. State*, 392.
4. The Act of 1890, ch. 536, provided that every corporation incorporated *since* January 1st, 1890, should pay a certain bonus tax. This Act was approved April 8, 1890. *Held*, that the Act applies to all corporations created after April 8th, as well as to those formed since January 1st and before April 8th. *Roland Park Co. v. State*, 448.
5. An Act of the Legislature, the effect of which is simply to levy a tax on the citizens of a certain county to pay residents of that county the debts due them by an insolvent Railroad Company, is unconstitutional, because it involves taxation for a private purpose. *Batto. & Eastern Shore R. R. Co. v. Spring*, 510.
6. Counties have no inherent power of taxation and the Legislature can only delegate to them the power to tax for public purposes. *Ibid.*

See CONSTITUTIONAL LAW, 4, 6, 13.

## TENANTS IN COMMON.

See ESTATES.

## TIME.

See BILLS AND NOTES, 2.

## TITLE OF STATUTES.

See CONSTITUTIONAL LAW, 8-11.

## TRUSTS AND TRUSTEES.

1. A trustee to whom a sum of money is bequeathed has no right to accept from the executor of the testator a promissory note of a third person, in part payment of the legacy; and if he does accept it, he ought to proceed at once to collect the same. *Hunt v. Gontrum*, 64.
2. If at the time of accepting such note it could be collected, and the trustee neglects to do so for some years until the maker becomes insolvent, his estate is liable to make good the loss to the trust fund. *Ibid.*
3. In the absence of express authority in the instrument creating the trust, a trustee has no right to invest the funds in personal securities, and if he does, he makes the investment at his own peril; and even where the investment is left to his discretion, it is not the exercise of a sound discretion to invest in such securities. *Ibid.*
4. If a trustee makes an improper investment of the trust fund at the request of the *cestui que trust*, or if the *cestui que trust* consents to the investment, the trustee will not be held liable

TRUSTS AND TRUSTEES—*Continued.*

to make good a loss arising from the same. But to relieve the trustee from liability in such cases, the *cestui que trust* must be *sui juris*, and capable of acting for himself, and the acquiescence must be with full knowledge of the facts, and with knowledge as to his legal rights. *Ibid.*

5. Where real estate is given to trustees and their heirs in trust to pay the net income to one for life, and upon his death in trust for his children and the issue thereof living at his death, the trust ceases upon the death of the life-tenant, the interest of the *cestuis que trust* in remainder being then converted into a legal estate. *Hooper v. Felgner*, 262.
6. The same rule is applied where the trust embraces personal property, and when all the objects of the trust have been accomplished, the person entitled to the beneficial use is regarded as the absolute owner, and as such is entitled to the possession of the property. Nor will the minority of the *cestuis que trust* in such case cause the trust to continue until they become *sui juris*, but the guardians of such infants are entitled to hold the property. *Ibid.*
7. Real estate was devised to trustees upon trust to permit the testator's daughter G. to use the same and to take the net rents, etc., during her life, without power to anticipate the income or encumber the trust estate, and at her decease, upon trust for the children of G. then living and the issue of any then deceased child; in default of children a power of appointment by will was given to G. After the death of the testator, G. died, leaving two daughters, one of whom was under age. *Held*, that upon the death of G., the life-tenant, the trustees had no longer any active duties to perform, and the legal estate being executed under the Statute of Uses in the two daughters, the trust was at an end. *Ibid.*
8. Personal property was bequeathed to trustees upon trust to pay the net income thereof to the testator's daughter G., for life, without power of anticipation or to encumber the estate, and from her decease upon trust for all the children of G. then living, and the issue of any deceased children. *Held*, that upon the death of G., leaving two daughters, one being an infant, the objects of the trust were accomplished, and G.'s daughters became the absolute owners of the property, the share of the infant daughter being payable to her guardian. *Ibid.*

## See ASSIGNMENT FOR BENEFIT OF CREDITORS.

DEVISE AND LEGACY, I, 4.

EQUITY, I, 2.

VENDOR AND PURCHASER, I.



## TURNPIKE COMPANIES.

1. Under Code of Public Local Laws, Art. 4, sec. 818, when a Turnpike Company cedes to the city of Baltimore any portion of its road lying within the corporate limits, it thereby becomes a public street without any act of acceptance on the part of the municipal authorities. *Mayor & C. C. of Baltimore v. President, etc., of the Balto. & Yorktown Turnpike, etc.*, 535.
2. This power to cede is not restricted to those portions of the turnpike roads which were within the city limits at the time the Act was passed, but the statute, being in general terms, includes the right to cede to the city such parts of the roads as are within the city limits as extended subsequently. *Ibid.*
3. But when a Turnpike Company exercises this power, it must make the cession without the reservation of any rights, and the road ceded must not be burdened with any easements. *Ibid.*
4. The defendant company executed and placed on record a deed to the Mayor and City Council of Baltimore granting and ceding to the city that portion of its road within the city limits, subject to certain railway franchises previously granted to other corporations. This deed was not accepted by the city. *Held*, that the deed should be declared null and void, since the road ceded was burdened with easements in favor of the Railway Companies. *Ibid.*
5. A Turnpike Company, incorporated in 1804, was authorized by charter to grade its road. Subsequently the limits of Baltimore City were extended so as to include a part of the road. The company graded its road so that it was made to run some feet below the surface of certain public streets intersecting the same. *Held*,
  - 1st. That the charter of the company (having been granted without a statutory or constitutional reservation of the right to alter) could not be impaired by subsequent legislation; that consequently the right of the company to change the grade of its road continued, but that the exercise of this right was subject to the police power of the State.
  - 2nd. That the municipality had a right to demand from the Turnpike Company compensation for the cost to be incurred in making the grade of said intersecting streets conform to the altered grade of the turnpike. *Ibid.*
6. In an action against a Turnpike Company to recover damages for an injury alleged to have been caused by the defective timbers of a bridge on defendant's road, evidence of a witness, who examined the bridge several months after the accident, to the effect that the timber was decayed, and that, from his knowledge of the qualities of such wood, the decay must have set in at the time of the accident, is admissible. *Washington, Colesville, &c., Co. v. Case*, 36.

TURNPIKE COMPANIES—*Continued.*

7. A Turnpike Company is bound to keep its bridges in safe condition, and is liable to a person who, while exercising ordinary care himself, is injured in consequence of the unsafe condition of a bridge. *Ibid.*
8. By such corporation is not an insurer of the safety of travellers using its roads and bridges. If a bridge is properly maintained, and an injury is caused by the accidental displacement of a single plank, of which the company had no notice and could not by the exercise of reasonable diligence have known, then the company is not liable. *Ibid.*
9. The fact that the bridge in question was repaired a year after the injury complained of, furnishes no evidence from which the plaintiff can claim that the repairs were made because the bridge was in a defective condition at the time and place of the accident. *Ibid.*
10. The care and caution which a discreet and prudent individual would exercise if the risk were his own is not the care and caution required of a turnpike road or bridge company. The mere use of ordinary care in repairing the bridge would not exculpate the defendant if it had not by such care made the bridge safe. *Ibid.*
11. The fact that the plaintiff had not paid toll for the use of the bridge where the accident occurs, does not exempt the defendant from liability for its negligence. *Ibid.*

## USE AND OCCUPATION.

See ESTATES.

## VENDOR AND PURCHASER.

1. A trustee made an absolute conveyance of part of the trust property by a deed reciting the full payment of the purchase money when only a part of the same was in fact paid. The vendee conveyed the property to the defendant corporation which paid the consideration. Upon a bill filed by a substituted trustee to enforce a vendor's lien against the defendant, *Held*, that although the trustee was guilty of a breach of trust in making such conveyance, yet the defendant was not liable, unless it had notice when the property was bought, that part of the purchase money was still owing from its vendor to the trustee. *Maryland Land, &c., Homestead Association v. Moore*, 102.
2. Upon the facts of this case, it was *held* that neither the defendant nor its attorney had notice that part of the purchase money of the land was due from its vendor to the trustee, and that the defendant was consequently a *bona fide* purchaser without notice of the breach of trust. *Ibid.*

## VENUE.

See CRIMINAL LAW, 3.

## VOTERS.

See ELECTIONS AND VOTERS.

## VOUCHER.

See ATTACHMENT, 1.

## WAGES.

See INSOLVENCY, 8.

## WAIVER.

See INSURANCE, 3-5, 12.

SALES, 1.

## WARRANTY.

See SALES, 1.

## WILLS.

When a caveat to a will is filed before the same has been admitted to probate, the Orphans' Court has no power to admit the will to probate until the caveat has been disposed of. *Keene v. Corse*, 20.

See DEVISE AND LEGACY.

DOWER.

## WITNESSES.

1. A witness may be asked on cross-examination, in order to impeach his credibility, whether he had ever been in jail, and why he had been sent there. *McLaughlin v. Mencke*, 83.
2. Whether children of tender years are competent witnesses is a matter within the discretion of the trial Court. *Freeny v. Freeny*, 406.

See BILL OF EXCEPTIONS, 1, 5.

EVIDENCE.

HIGHWAYS AND STREETS, 7.

## WRIT.

See CERTIORARI.

*Ex. 15.*







